SUPREME COURT, U. S.

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APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 645.

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a Corporation, ALFRED, REALTY COMPANY, a Corporation, PADDOCK COUNTRY CLUB, INC., a Corporation, ALFRED H. MAYER, an Individual, and an Officer of the Above Corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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DOCKET ENTRIES.

Date	Proceedings.
1965	
Sept. 2	Complaint filed and summons issued.
Nov. 5	Submission of defts' motion to dismiss vacated.
	First Amended complaint filed by leave.
Dec. 6	Defts' motion to dismiss first amended complaint and supporting memo filed.
Dec. 14	Pltffs' brief filed.

1966	
May 18	Memorandum opinion filed. Order filed and entered sustaining defts' motion to dismiss pltffs' first amended complaint and dismissing amended complaint. Copies of opinion and order mailed to Israel Treiman and to Samuel H. Liberman, II.
May 26	Pltffs' notice of appeal to the U. S. Court of Appeals from order dismissing first amended complaint entered in this action on May 18, 1966, filed and duplicate thereof mailed to Shifrin, Treiman, Agatstein & Schermer; attorneys for defts.
July 6	Certified copies of notice of appeal and of docket entries in U. S. District Court filed.
	Appellants filed appearance.
July 11	Appellees filed appearance.
Aug. 15	Appellants filed brief.
Sept. 8	Appellees filed brief.
Sept. 19	Reply brief of appellants filed.
Oct. 18	Transferred to calendar of November 1966 session.
Nov. 18	Argued and submitted to Judge Blackmun, Mehaffy and Lay. Samuel H. Liberman, II for appellant and Israel Treiman for appellee.
1967	
June 26	Opinion, Judge Blackmun. Judgment affirmed.
July 10	Motion by appellant for stay of mandate filed.
	Order: Issuance of mandate stayed for period of 30 days.

Aug. 9 Motion by appellant for further stay of issuance of mandate filed. Order for issuance of mandate to stay for further period of 30 days granted.

Sept. 7 Motion by appellant for further stay of issuance of mandate filed. Order for issuance of mandate for stay to October 9, 1967, granted.

Sept. 25 Certificate evidencing docketing of case in U. S. Supreme Court filed.

Dec. 9 Certified copy of order of U. S. Supreme Court granting petition for writ of certiorari filed.

FIRST AMENDED COMPLAINT.

(Filed in U. S. District Court Sept. 2, 1965.)

Come now Plaintiffs and state for their cause of action against the Defendants:

1. Plaintiffs are citizens of the United States of America and are citizens and residents of the State of Missouri: Plaintiffs are husband and wife, and Plaintiff, Joseph Lee Jones is a Negro. Plaintiffs presently reside at 4585 Carter Avenue, St. Louis, Missouri. Mr. Jones is employed by an agency of the federal government, to-wit: the Veteran's Administration at its hospital in St. Louis, Missouri. Mrs. Jones is employed by an agency of the federal government, to-wit: the Veteran's Administration at its West Side Hospital in East St. Louis, Illinois.

2. Each corporate defendant is a Missouri corporation authorized and existing under and by virtue of law, and has its principle place of business in St. Louis County, Missouri. Defendant, Alfred H. Mayer, is a resident of St. Louis County in the State of Missouri and is the managing officer of Defendant Alfred H. Mayer Company and the Defendant Alfred Realty Company. Defendant, Alfred H. Mayer owns a controlling interest in both of said corpo-

rations. Defendant Alfred Realty Company is licensed as a real estate dealer by the State of Missouri through the Missouri Real Estate Commission, and Defendant Mayer, individually, is similarly licensed by said State and Commission. Each of said Defendant Corporations now engages in substantial transactions in interstate commerce and at all times material hereto has been so engaged.

3. The Plaintiffs bring this action to redress the injury done them by the Defendants' concerted, willful refusal to sell a house and lot to Plaintiffs as husband and wife solely because of Plaintiff Joseph Lee Jones' race, in violation of Plaintiffs' rights, privileges, and immunities under the Civil Rights Act of 1866 (42 U. S. C., Sec. 1982), which guarantees all citizens a right to purchase real property equal to that enjoyed by white citizens; the Civil Rights Act of 1870 (42 U. S. C., Sec. 1981), which guarantees all persons the equal right to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of property, the Civil Rights Act of 1871 (42 U. S. C., Sec. 1983), which gives a right of action against anyone who, under color of state law, custom or usage, deprives any citizen of a right, privilege, or immunity guaranteed by the Constitution and laws of the United States, the Civil Rights Act of 1964 (42 U. S. C., Sec. 2000), which guarantees to all citizens regardless of race the right to enjoyment of facilities of public accommodation; the Executive Order on Equal Opportunity in Housing (Executive Order No. 11063) which condemns the practice of discrimination in the sale of housing; the Constitution of the United States of America, Amendment Thirteen, which abolishes slavery and the indicia thereof, and Amendment Fourteen, which guarantees that no citizen shall be deprived of his liberty or property without the process of law and that no citizen shall be deprived of equal protection of the laws; and Article I, Section 8, Clause 18 and Article VI of the Constitution of the United

States of America which gives Congress the right to establish various federal agencies, including the Veteran's Administration, and precludes interference with the functioning of said agencies.

4. This Court has jurisdiction pursuant to Title 42, U. S. C., Sec. 1983, and Title 28, U. S. C., Secs. 1331, 1337 and 1343.

5. Defendant Alfred H. Mayer Company is engaged in the business of developing subdivisions, that is, buying and holding parcels of land in St. Louis County, and operating as a construction company in building homes on this land to be resold to the public. Defendant Alfred Realty Company operates as a real estate dealer licensed by the State of Missouri through its Real Estate Commission, and as the exclusive sales agent of the houses built by Defendant Alfred H. Mayer Company. Defendant Alfred H. Mayer serves as managing officer and the guiding policy maker of both the foregoing corporations, and the policies of both of said corporate Defendants are simply the corporate embodiment of the policies and decision of Alfred H. Mayer individually. The necessary loans and financing to Alfred H. Mayer Company for its use in the purchase of land, building material, labor, and in paying other expenses pursuant to building and sale of houses in said subdivision are provided by Mercantile Mortgage Company pursuant to agreement with the defendant; and said Mercantle Mortgage Company has been made the exclusive source of financing for the purchasers of said homes. Paddock Woods is a subdivision located in St. Louis County, which at the present time is being developed by Defendants in the manner outlined above.

6. In February, 1965, Plaintiffs, because they determined their present home to be inadequate and unsatisfactory to their needs and desires, began to look for a

new home. Plaintiffs found many attractive new homes for sale, but solely because of Plaintiff Joseph Lee Jones' race, Plaintiffs were avoided, deceived, and delayed by developers and their agents in this community, including Defendants and their agents. On Tuesday, June 8, 1965, the Plaintiffs, proceeding on the basis of information published in an advertisement found in the St. Louis Post-Dispatch of Sunday, June 6, 1965 (a daily newspaper, circulated in interstate commerce and receiving news and advertising directly and indirectly from outside the State of Missouri where said newspaper is published), went to a development known as Paddock Woods, which was held out to be opened by the Defendant Alfred H. Mayer Company, Defendant Alfred Realty Company, and Defendant Alfred H. Mayer to the public for inspection in order to sell houses and lots. Plaintiffs proceeded to the site of said development at 6700 Parker Road and inspected from the outside the display homes constructed there. Plaintiffs then entered the office maintained by Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer within one of the display homes, intending to inquire further. Upon entering the office Plaintiffs were avoided by the salesmen and agents of Defendants, who conducted themselves in a manner indicating that they did not wish to do business with the Plaintiffs. After picking up a brochure describing said development, Plaintiffs proceeded to inspect the inside of the several display homes of different styles on the site. Plaintiffs determined that the houses in said development were well constructed and designed, and that one style of house particularly suited Plaintiffs' needs and resources, and was reasonably accesible to their places of employment with the Veteran's Administration. Plaintiffs, therefore, returned to the said office in order to obtain more information and offer to purchase such a home. They there approached one of Defendants' sales-

men and agents who said: "Before we go any further, we do not take earnest money from Negroes." Plaintiff, Barbara Jo Jones, inquired why not, and was told by said agent in reply, "At least not until the market opens up." This ended the negotiations in which the agents of Defendants were willing to engage. The Defendants refused to consider Plaintiffs' application to purchase a house and to enter into a contract for the sale of a house and lot, because Joseph Lee Jones is a Negro, and it is Defendants' general policy not to sell said houses and lots to Negroes.

7. The Plaintiffs' right to obtain housing without discrimination based on race has been and continues to be violated by the conduct of Defendants in that:

(a) Defendants Alfred H. Mayer Company, Alfred Realty Company, and Mercantile Mortgage Company are corporations granted the legal privilege of operating in corporate form without personal liability on the part of their principals by the State of Missouri.

(b) Defendants are licensed to participate in their respective businesses by the State of Missouri through its Real Estate Commission and Defendants made use of the services of numerous other businesses licensed and regulated by the State of Missouri, such as plumbers, electricians, banks, lending institution, etc.

(c) Defendants are protected in their operations by various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property.

(d) The State of Missouri, its political subdivision, and other administrative agencies contribute to the conduct of Defendants' businesses in many ways including the following:

(1) The Building Commissioner of St. Louis County must approve the plans of Defendants and cooperate with Defendants in order to accomplish the building of homes in said subdivision.

(2) The Metropolitan St. Louis Sewer District has furnished and will furnish sewer services to the said subdivision.

(3) The Planning Commission of St. Louis County and the St. Louis County Council are responsible for the zoning of the land in said subdivision and the enactment of an overall plan for use of land which will assure that this subdivision will retain its value as a successful residential area.

(4) All transfers of property in said subdivision, as well as its trust indenture embodying restrictions on use of said subdivision are presently or will be recorded in the Office of the Recorder of Deeds of St. Louis County.

(5) Numerous other offices, such as the traffic department, highway department, county engineer, etc., are available and contribute the time and resources of the County of St. Louis and State of Missouri to the success of the Defendants' venture.

(6) Education for the children of families living in said subdivision is provided by a school district which receives assistance and funds from the State of Missouri and from the taxpayers of said County and State.

(e) Defendants are aided in the sale of homes in said subdivision by Union Electric Company a licensed utility of the State of Missouri, which said corporation not only supplies electricity and electrical equipment to the homes in said subdivision, but further certifies the homes as "Medalion Homes", which endorsement is carried on the promotional material of Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer

and allows the Defendants to profit from the extensive advertising of said "Medalion Homes" by said electric company. Defendants also receive the benefit of services of the Laclede Gas Company, another licensed utility of the State of Missouri subject to regulation by the Public Service Commission.

The State of Missouri and its political subdivisions have become involved in the success of the development of Paddock Woods in all the significant activities set forth above and in paragraph eight below. The State of Missouri did not intend and cannot lawfully countenance the use of its said facilities and laws for the benefit of a restricted portion of the population: and having obtained such numerous benefits from the State of Missouri upon the valid basis that this subdivision would in turn benefit the State of Missouri, Defendants are obliged under law to make the homes in said subdivision available to all citizens and residents of the State on an equal basis without discrimination based on race.

8. Defendants Alfred H. Mayer Company, Alfred Realty Company and Alfred H. Mayer build not just houses for sale but communities as well. The development of Paddock Woods is a complete and well planned municipal subdivision of the State of Missouri. This community is enlarged by said Defendants' other nearby developments: Paddock Estates, Paddock Meadows, and Wedgewood, all of which are financed by loans insured by the Federal Housing Administration, so that Paddock Woods is a part of a community provided, at least in part by loans insured by the credit of the Federal Government. Everything needed for a residential community is provided in Paddock Woods and all of it is provided by Defendants. Paddock Woods includes over One Hundred (100) projected homes and the opening, within one (1) year, of more plats in this subdivision is planned. The ulti-

mate result will be a small suburban community of approximately One Thousand (1000) people—living in an area chosen by Defendants for development, residing in homes designed and built by Defendants, driving on streets built by Defendants, playing golf on the nearby eighteen (18) hole course built by Defendants for the convenience of residents of the above subdivisions, and enjoying the facilities of the nearby bath and tennis club which Defendants plan to open on May 31, 1966, for the exclusive use of residents of Paddock Woods. Taking into account all the subdivisions mentioned above; this community will comprise some Twenty-Seven Hundred (2700) families. The streets of Paddock Woods are at this time being built by Defendant Alfred H. Mayer Company, on land owned by the said Defendant, and title to said streets will be maintained by Defendant until such time as a Board of Trustees is formed by Defendant to take over this function. Defendant Paddock Country Club, Inc., was incorporated and is controlled by Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer for the primary use and benefit of the people in this said community; the bath and tennis club, which is widely advertised by Defendants as an inducement to the sale of said houses, is to be incorporated and controlled by Defendants for the benefit of the home owners in this subdivision, and the exclusion of Negroes from said subdivision, from the golf course operated by said Paddock Country Club, Inc., and from said bath and tennis club is a violation of Plaintiffs' rights under the Civil Rights Act of 1964 (42 U. S. C. 2000 d), as well as the State law of Missouri. Community services such as refuse collection will be performed by or for the Defendant Alfred H. Mayer Company for the benefit of the residents of Paddock Woods. Defendants Alfred H. Mayer Company, Alfred Realty Company and Alfred H. Mayer have prepared or shall prepare a deed embodying certain

restrictions on the use of the property sold to individual buyers in said subdivision and on that land which is common to all residents and have the same recorded along with the deeds delivered to those buying homes, and an association of the residents will be formed which will have the power to enforce these restrictions against owners of homes within the subdivision, through judicial recourse, if necessary, which power is the equivalent of the power to design and enforce zoning ordinances and the power to function as municipal government generally. Community facilities and services will be provided and performed under the direction of a Board of Trustees appointed by the Defendant Alfred H. Mayer, which will be granted the power to levy assessments, and to collect these assessments through judicial action in case of default, including the establishment of liens on properties located in said subdivision and to make contracts for the performances of the services for the benefit of Paddock Woods residents, which powers are equivalent to the function of a municipal government. Since these facilities are built and maintained primarily to benefit the public and since the Defendants plan to operate them as would a governmental body for the benefit of the residents, the Defendants' conduct is subject to state regulation, and is in fact an extension or subdivision of the state's authority.

Citizens living in this community are being denied their rights under the 1st and 14th Amendments to the Constitution of the United States to freely associate with whomever they please. Those residents who would wish to live in an integrated community and have the experience of living with Negroes and providing their children with opportunity to meet and know, and go to school with Negro children during their formative years are denied this right of freedom of association. In the same manner the Defendants are denying the Plaintiffs the opportunity to

associate with white neighbors, and instead enforcing their residence in an all Negro area.

9. Plaintiffs desire to purchase and have selected from the various models and styles of homes offered by Defendants for sale in said Paddock Woods a "Hyde Park" model, three bedroom, "contemporary" style home, with two (2) car, rear-entry garage, all brick finish, intercom system, fully paneled family room and optional fireplace facing, which home according to the promotion material of Defendants Alfred H. Mayer, Alfred H. Mayer Company, and Alfred Realty Company can be built and sold to purchasers for a total price of $28,195.00; Plaintiffs have further selected Lot No. 7147 as their first choice of the lots available in said subdivision, but Plaintiffs are willing to choose another lot if said lot has been taken by another purchaser before relief can be granted.

10. As a result of the matters alleged hereinabove, Plaintiffs have suffered actual damages in the amount of $50.00 and irreparable harm by way of humiliation and deprivation of rights granted them by the laws, statutes, and Constitution of the United States of America. Plaintiffs have no adequate remedy at law, and in order to grant Plaintiffs full and adequate relief it is necessary that this Court order Defendants to sell to Plaintiffs a home of the type set forth above for cash or on such other reasonable financing terms as may be in accordance with normal practices involved in the sale of houses in Paddock Woods, and it is also necessary to enjoin the said Defendants from disposing of the lot of Plaintiffs' choice pending this litigation, because unless such injunction is ordered, there may be no lots available by the time this litigation has terminated.

11. The acts of Defendants set forth above were intentional, willful, and malicious, constituting a deliberate deprivation of Plaintiffs' rights, for which Plaintiffs are

entitled to recover punitive damages in the amount of $10,000.00.

12. Wherefore, Plaintiffs pray this Court for a preliminary injunction enjoining the Defendants Alfred H. Mayer Company, Alfred Realty Company, and Alfred H. Mayer and their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from failing to reserve Lot No. 7147 in the Paddock Woods subdivision of, or if said lot has been sold, some other lot in said subdivision sufficient to accommodate the home selected by Plaintiffs as alleged above. Plaintiffs further pray this Court for a permanent injunction enjoining the Defendants, their agents, servants, employees, attorneys, and all other persons in active concert and participation with them from failing to sell Plaintiffs said home and lot selected by Plaintiffs and from failing to construct said home diligently and carefully in accord with normal practice in Paddock Woods, and from discriminating in the future on the basis of race, color, creed, religion, or national origin in the sale of homes in the Paddock Woods subdivision, and for an order requiring the Defendants to sell Plaintiffs such a house and lot in accordance with Defendants' normal practice. Plaintiffs further pray for a judgment for damages against Defendants in the sum of $50.00 plus punitive damages of $10,000.00 and for such further relief as may to this Court seem fit and proper.

Samuel H. Liberman, II,
Attorney for Plaintiffs,
722 Chestnut Street,
St. Louis, Missouri 63101
CHestnut 1-8250.

MOTION TO DISMISS FIRST AMENDED COMPLAINT.

(Filed in U. S. District Court Oct. 18, 1965.)

Defendants move the Court to dismiss this action because the First Amended Complaint fails to state a claim against Defendants upon which relief can be granted.

Israel Treiman,
Shifrin, Treiman, Agatstein & Schermer,
Attorneys for Defendants,
611 Olive Street,
St. Louis, Missouri 63101,
CHestnut 1-2140.

Copy of the foregoing Motion served upon Plaintiffs by mailing same to Mr. Samuel H. Liberman, II, Attorney for Plaintiffs, 722 Chestnut Street, St. Louis, Missouri 63101, this * * * day of December, 1965.

Israel Treiman.

ORDER.

(Filed in U. S. District Court May 18, 1966.)

This matter is before the Court on defendants' motion to dismiss plaintiffs' first amended complaint.

The Court having this date sustained defendants' motion to dismiss plaintiffs' first amended complaint It Is Hereby Ordered that said first amended complaint be and it is hereby dismissed.

Dated this 18th day of May, 1966.

/s/ John K. Regan,
United States District Judge.

MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT.

(Filed in U. S. District Court May 18, 1966.)

This matter is before the Court on defendants' motion to dismiss plaintiffs' first amended complaint. The action was brought by Joseph Lee Jones, a Negro, and his wife, both of whom are employed by the Veterans Administration, an agency of the United States Government. The injury alleged is the refusal of defendants to sell a house and lot to plaintiffs solely because of Jones' race, in alleged violation of plaintiffs' rights under Sections 1981, 1982, 1983 and 2000, Title 42, U. S. C., Executive Order No. 11063, providing for Equal Opportunity in Housing, the Thirteenth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 8, Clause 18, and Article VI of the Constitution of the United States. Plaintiffs assert jurisdiction in this court pursuant to Section 1983, 42 U. S. C., and Sections 1331, 1337 and 1343, Title 28, U. S. C.

For the purpose of the motion to dismiss, we take as true the facts well pleaded in the complaint. *Bonnot v. C. I. O. Local No. 14*, 8 Cir., 331 F. 2d 355.

Defendant, Alfred H. Mayer Company, a Missouri corporation, is engaged in the business of developing subdivisions, that is, buying and holding parcels of land in St. Louis County, Missouri, and building homes on this land to be resold to the public. Defendant, Alfred Realty Company, a Missouri corporation, is a real estate dealer which acts as the exclusive sales agent of the houses built by Alfred H. Mayer Company. Defendant Alfred H. Mayer owns a controlling interest in both corporations and is their managing officer. Defendant, Paddock Country Club, Inc., a Missouri corporation, is controlled by the

other defendants "for the primary use and benefit of the people who will reside in the subdivision."

Defendants are alleged to be presently developing a subdivision in St. Louis County known as Paddock Woods. After plaintiffs inspected a display house on the site and determined that one style of home particularly suited their needs and was reasonably accessible to their places of employment, they sought to obtain additional information from defendants and offer to purchase such a home. Plaintiffs allege that they desire to purchase a Hyde-Park model home, which, according to defendants' promotion material, can be built and sold to purchasers for a total of $28,195, presumably inclusive of the lot in the subdivision on which the plaintiffs desired the home to be built. However, defendants, through their agents, informed plaintiff of defendants' "general policy not to sell houses and lots to Negroes," and in effect "refused to consider plaintiffs' application to purchase a house and enter into a contract for the sale of a house and lot."

A substantial portion of the complaint is devoted to allegations concerning defendants' plans and intentions relating to the future development of Paddock Woods. Thus, it is alleged that Paddock Woods includes over 100 "projected" homes, that the opening of more plats in the subdivision is planned, that streets in the subdivision are presently being built by Alfred H. Mayer & Company on land it owns (title to which will ultimately be transferred to a board of trustees to be formed by it), so that the "ultimate result" will be a suburban community of approximately 1,000 people "living in an area chosen by defendants for development, residing in homes designed and built by defendants, driving on streets build (sic) by defendan's, playing golf on the nearby eighteen (18) hole golf course built by defendants for the convenience of residents (of this and other nearby subdivisions developed by defendants), and enjoying facilities of the nearby bath

and tennis club which defendants plan to open for the exclusive use of the residents of Paddock Woods."

For the purpose of the motion to dismiss, we assume that but for the color of Mr. Jones' skin, defendants would have sold to plaintiffs the lot they desire and would have built for them thereon the style of home they selected.

Plaintiffs do not contend that every person who offers a home for sale has no right to refuse to sell his property on racially discriminatory grounds. The thrust of their complaint is that the developer of a private subdivision is in a different category, apparently because his activities are business in nature. In their brief filed in opposition to the motion to dismiss, plaintiffs state their theory thusly: "The basis of the cause of action set forth in Plaintiffs' First Amended Complaint is that Defendants are prevented by federal law from discriminating on the basis of race in refusing to sell lots and houses to Negroes in the subdivision they are building in St. Louis County." Stated otherwise, the issue is whether the willful refusal of an owner of private property who is developing a private subdivision thereon to sell a part of his property to a Negro solely because of race entitles the person so discriminated against, under any presently applicable federal law, either to damages or to a mandatory injunction or both. Under the present state of the law, our answer must be in the negative.

The language of Sections 1981 and 1982, reciting certain rights of citizens of the United States (e. g. to purchase, sell, hold and convey real and personal property and to make and enforce contracts) is broad and general. The legal right to purchase property does not, however, carry with it a corresponding obligation on the part of the owner to enter into a contract of sale against his will.

It is now well settled that these civil rights statutes are directed toward governmental action. *Hurd v. Hodge*,

334 U. S. 24; *Buchanan v. Warley,* 245 U. S. 60. In *Buchanan,* it was said (245 U. S., l. c. 79), "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to *qualify* and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." A long line of cases makes it clear that Section 1983 (which alone of the civil rights statutes, other than the Civil Rights Act of 1964, provides for a right of action) may be resorted to only in situations where *state action* is involved. It is true, of course, that the concept of "state action" has been greatly expanded since the early *Civil Rights Cases,* 109 U. S. 3, and that it is not limited to state legislation, but state action in some form there must be. And it is equally true that "[w]hat is 'private' action and what is 'state' action is not always easy to determine." *Evans v. Newton,* 382 U. S. 296, 299.

Mr. Justice Frankfurter in his concurring opinion in *Terry v. Adams,* 345 U. S. 461, 472, stated the concept in this fashion, "The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied (civil) rights merely because they are colored."

Even Mr. Justice Douglas, from whose concurring opinions plaintiffs quote at length, is committed to the view that "The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by individuals." *United States v. Williams,* 341 U. S. 70, at 92. And as recently as March 28, 1966, in *United States v. Guest,* the Supreme Court stated that such "has been the view of the Court from the beginning" and "it remains the Court's view today." See also *United States v. Price,* decided the same day as *Guest.*

Plaintiffs' protestations to the contrary, there must be some substantial involvement of the state or one acting

under the color of its authority, even though such involvement of the state need not be either exclusive or direct. Involvement, however, there must be. See *Wallach v. Cannon,* 8 Cir., 357 F. 2d 557, 561-562.

We have carefully read all of the forty or more cases cited by plaintiffs in support of their contention that they have a right of action against defendants under the existing civil rights statutes and the federal constitution. We find all such cases clearly distinguishable.

Shelley v. Kraemer, 334 U. S. 1, involved an effort to judicially enforce in state courts restrictive covenants which operated to prevent the occupancy and purchase of real property by Negroes. The restrictive covenants were contained in private contracts between private persons. The Supreme Court stated, "It cannot be doubted that among the civil rights intended to be protected from discriminatory *state action* by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property."

In *Shelley,* as in the other cases to which we have been cited, the key words are "state action." The court found the requisite state action in the *participation of the state courts* in the *enforcement* of the restrictive covenants. Said the court, 334 U. S., l. c. 19, "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. *The owners of the properties were willing sellers; and contracts of sale were accordingly consummated.* It is clear that but for the *active* intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint" (Emphasis supplied).

In the instant case, not only were no contracts of sale consummated, but on the contrary the owners of the property are *unwilling* to sell at all to plaintiffs. No state ac-

tion has been exerted in favor of defendants. Defendants are not seeking the aid or intervention of the courts to prevent plaintiffs from acquiring the property. To the contrary, it is plaintiffs who ask this court to compel defendants to dispose of their property against their will.

Parenthetically, we note that authough there is no intimation in *Shelley* that the contracts in question were invalid even though unenforceable,[1] the present case does not involve any restrictive covenants or agreements between defendants and the ultimate purchasers of property in the subdivision *prohibiting* the sale of the property therein to Negroes. What we have presently before us is simply the initial refusal of the present owner of the property to sell his own property to a Negro. Cf. *Corrigan v. Buckley*, 271 U. S. 323, 330, holding that "[t]he prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals' . . . 'Individual invasion of individual rights is not the subject matter of the Amendment.' Civil Rights Cases, 109 U. S. 3, 11." The court further stated (271 U. S., l. c. 331) that "it is obvious that while they (present sections 1981, 1982 and 1983, Title 42, U. S. C.) provide, *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." It would appear, a fortiorari (sic), therefore, that these statutes do not compel an owner of private

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[1] The reverse is true, "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." (334 U. S., l. c. 13.)

property to sell such property to any other person against his will, whatever the reason may be for his refusal.

Hampton v. City of Jacksonville, Florida, 5 Cir., 304 F. 2d 320, involved two golf courses which the city had owned and operated for its residents. After an injunction prevented the city from operating these golf courses on a racially segregated basis, they were sold to private persons (on very favorable terms to the purchasers), each conveyance containing a reversionary clause ensuring that the property would *continue* to be used for the purpose of a golf course. The purchasers in each instance restricted the use of the golf courses to white persons only. An action was then brought to enjoin such restrictive operation.

In the court's view, the absolute obligation of the new owners of the property that they immediately, presently and always use the property for golf course purposes and no other, constituted "complete present control" by the City, and that the reservation of control in the reversionary clause involved the City "to the extent necessary to constitute such operation 'state action.'" Said the court, "So, too, where the City of Jacksonville, which has long been in the *business of operating golf courses for its residents,* elects to sell the golf courses, but *only* on condition that they *continue* to be used in such manner that the *public* will still enjoy their benefits in the *same* capacity, the city is permitting the private individual to perform this part of the *City's* function." The court rejected the argument that unlike a lease the case involved simply the sale of city property. Answering this argument the court said (304 F. 2d, l. c. 322), "Conceptually, it is extremely difficult, if not impossible, to find any rational basis of distinguishing the power or degree of control, so far as relates to the state's involvement, between a long-term lease for a *particular purpose* with the right of cancella-

tion of the lease if that purpose is not carried out on the one hand, and an absolute conveyance of property, subject, however, to the right of reversion *if the property does not continue to be used for the purpose prescribed by the state* in its deed of sale."

Among the lease cases are *Derrington v. Plummer,* 5 Cir., 240 F. 2d 922; *Department of Conservation and Development v. Tate,* 4 Cir., 231 F. 2d 615, and *Burton v. Wilmington Parking Authority,* 365 U. S. 715. In *Derrington,* the County constructed a new courthouse in which part of the basement was finished and equipped for use as a cafeteria. The cafeteria space was leased to Derrington to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. That is, the *County* undertook to furnish eating facilities to all persons without regard to race. Derrington refused to serve Negroes. The court held that under the facts the action of the lessee "may well be said to be conduct of the County and thus 'state action' within the inhibition of the Fourteenth Amendment." The court noted that the courthouse had just been built with public funds for use by citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. It was held that since the express purpose of the lease was to furnish services to people in the courthouse, it followed that "in rendering such services the lessee stands in the place of the County," so that the lessee's "conduct is as much state action as would be the conduct of the County itself." Here, too, we see *direct* involvement by the County in a meaningful manner, in the use of public property, as contrasted to the entire want of any comparable involvement in the instant case as well as the completely private nature of defendants' property.

Boman v. Birmingham Bus Company, 5 Cir., 280 F. 2d 531, invalidated a local bus company's rule requiring sepa-

rate seating of Negroes and white. A city ordinance expressly requiring separate seating was repealed, and at the same time a new ordinance was enacted authorizing the transit company to adopt seating rules and regulations and making the violation of such rules a criminal offense. The court found the requisite "state action", holding, "Where, as here, the City *delegated* to its *franchise* holder the power to make rules for seating of passengers and made the violation of such rules criminal, . . . we conclude that the Bus Company *to that extent* became an agent of the State and its actions in promulgating and enforcing the rule constituted a denial of the (individual's) constitutional rights."

The Court pointed out that the right to use the *public* streets for hire is a special privilege, and that the issuance of a franchise to operate a bus line for transportation of passengers for hire is a governmental function. Said the court, "[T]he justification for the grant by a state to a private corporation of a right or franchise to perform such a public utility service as furnishing transportation, gas, electricity, or the like, *on the public streets of the city,* is that the grantee is about the public's business. It is doing something the state deems useful for the public necessity or convenience. *This is* what differentiates the public utility which holds what may be called a 'special franchise,' from an ordinary business corporation which in common with all others is granted the privilege of operating on corporate form but does not have that special franchise of *using state property for private gain* to perform a *public* function." (Emphasis supplied.) In the instant case, defendants are not performing a public utility service, do not have a special franchise, and make no use of public property in the conduct of their business.

A leading Supreme Court case on the subject of state action is *Burton v. Wilmington Parking Authority,* 365 U. S. 715. In that case, the court stated the applicable

standard of interpretation of the Fourteenth Amendment as follows: "Private conduct abridging individual rights does no violence to the Equal Protection Clause *unless to some significant extent* the State in any of its manifestations has been found to have become involved in it." (Emphasis supplied.) The court carefully refrained from any attempt to fashion and apply a precise formula for recognition of state responsibility, stating this was an "impossible task". It was held that whether the state is sufficiently involved in private conduct can only be determined in each case by sifting facts and weighing the circumstances there presented.

In *Burton,* an automobile parking building had been constructed with *public* funds for *public* purposes and operated by a *state* agency. A restaurant which was physically and financially a part of this public building, but operated by a private person under lease, refused to serve a Negro. The court held that in view of all of the circumstances, the State must be considered as a joint participant in the operation of the restaurant and that the challenged conduct could not reasonably be considered to be "purely private", so as to fall without the scope of the Fourteenth Amendment. Said the court (365 U. S., l. c. 726), "Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property *in the manner and for the purpose shown* to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."

In *Simkins v. Moses H. Cone Memorial Hospital,* 323 F. 2d 959, the issue presented was whether the activities of the hospital which participated in the Hill-Burton program ("with its massive financial aid and comprehensive plans") were sufficiently imbued with "state action" to

bring them within the Constitutional prohibition against racial discrimination. That is, the question for determination was whether the state or federal government or both became so involved in the conduct of this otherwise private body that its activities were also the activities of these governments. The court answered this question in the affirmative, holding that it was controlled by *Burton*. Just as the Supreme Court in *Burton* "attached major significance to 'the obvious' fact that the restaurant is operated as an integral part of a public building devoted to a public parking service", the court in *Simkins* found it significant "that the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health. Such involvement is discriminatory action 'it was the design of the Fourteenth Amendment to condemn.'" 323 F. 2d l. c. 967. Discussing the Hill-Burton Act, the court found a congressional design therein to induce the States to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory rather than an intent simply to grant financial aid to individual hospitals. In this situation it was said, "*Upon joining the program* a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care. And it is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the [institution actually chosen] would otherwise be private; the equal protection guarantee applies."

Smith v. Holiday Inns of America, Inc., 6 Cir., 336 F. 2d 630, applying the law as it existed prior to the Civil Rights Act of 1964 (which "would plainly render defendants' policy of racial discrimination illegal"), held that

the Fourteenth Amendment prohibited motel operators from refusing to accept Negroes as guests at a motel erected on land purchased in a city redevelopment project from the city housing authority. The court stated, "The single pervasive fact which defendants seek to ignore but which this court cannot is that this motel is part and parcel of a large, significant, and continuing *public* enterprise —the Capitol Hill Redevelopment Project." The court held that it was apparent that *public funds* of the city, state and federal government "were inextricably intermingled in the financing of the Capitol Hill Redevelopment Project. It is also obvious that the project was carried out by public agencies created by and operating under the laws of the United States and the State of Tennessee." Even though the fee was actually transferred (as distinguished from *Burton* which involved a lease), the court emphasized that in both cases "the basic plan, the financing, the land acquisition, the execution of the plan, the continuing supervision of the plan are all state actions under state law and through state agencies" (336 F. 2d, l. c. 635). The major factors in the decision were "The public design, and the continuing public controls over the project, as well as "the fact that part of the preconceived public design was to create a facility (a motel) which has service to the general public as its basic purpose." Holding that "the right not to have state finances, state agencies and state laws employed (for the purpose of banning some of the State's own citizens solely on the grounds of race) is a right encompassed in the Equal Protection Clause of the Fourteenth Amendment", the court ruled that the discrimination practiced by the defendants was not purely private in character and was the product of state action. In the instant case, the subdivision is not part of a redevelopment project or other public enterprise or program, and no public funds are used to finance or aid the development. To the contrary, the project, in all its aspects, is purely private.

Plaintiffs also cite the cases involving voting rights in which the Supreme Court ruled against primary elections held by a political party which barred Negroes from participation. Aside from the fact that essentially these cases pertain to Fifteenth Amendment rights, we find them wholly inapplicable to the instant situation. The first of these cases, *Nixon v. Herndon*, 273 U. S. 536, invalidated a Texas statute which barred the right of Negroes to vote in primary elections. *Smith v. Allwright*, 321 U. S. 649, again invalidated Texas all-white primary elections on the ground that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function." It was held that the state could not avoid its duties by so setting up its electoral process that a private organization controlling a primary was permitted to practice racial discrimination.

Smith was implemented by *Rice v. Elmore*, 4 Cir., 165 F. 2d 387, which held that even though all state laws provided for primary elections were repealed, nevertheless the action of the State in permitting a party to take over part of the election machinery could not operate to avoid the provisions of the Constitution forbidding racial discrimination in the elections which were clearly a state function.

And in *Terry v. Adams*, 345 U. S. 461, the Supreme Court held that the activities of the Jaybird Democratic Association "played a sufficient part" in the Democratic primary elections as to make its denial of the right of Negroes to vote in the Jaybird primaries a denial of effective participation in the elective process in selecting the officials in the County concerned and thereby deprived citizens of voting rights because of their color in violation of the Fifteenth Amendment.

In these election cases what is held is that private groups are subject to constitutional restraints "when they

perform functions of a *governmental* character in matters of great public interest." In *Nixon v. Condon,* 286 U. S. 73, 88, it was pointed out that the defendants were "acting in matters of high public interest, matters *intimately connected with the capacity of government to exercise its functions.*" "That is to say, when private individuals or groups are *endowed* by the State with powers or functions *governmental* in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton,* supra (382 U. S. 1. c. 299). We find no similar situation existent under the facts alleged in the complaint. No governmental power or functions are involved in the sale of private property, a lot in a private subdivision.

Another line of cases cited by plaintiffs deal with the utilization of trespass laws to enforce a state's policy of racial segregation. No doubt these cases are cited because in at least some of them the Supreme Court has discussed limitations upon the rights of owners of private property. Our study of these cases has convinced us not only that they fail to support plaintiffs' position, but also that much of the discussion therein by the Justices of the Court would lead to the opposite conclusion. We briefly refer to some of these cases.

Lombard v. Louisiana, 373 U. S. 267, simply held that where public officials had, in effect, determined that they would not permit Negroes to seek desegregated services in restaurants, the Court would not sustain the conviction of persons who refused to leave a restaurant in which they were denied service because of race. Plaintiffs' main reliance is on the concurring opinion of Mr. Justice Douglas. However, what he primarily stressed was the fact that the penalty was imposed upon the defendants by the state judiciary and that *such* action was necessarily "state action". Thus, "By *enforcing* this criminal mischief stat-

ute, invoked in the manner now before us, the Louisiana *courts* are denying some people access to the mainstream of our highly interdependent life solely because of their race." 373 U. S., l. c. 279.

Plaintiffs' brief quotes extensively from the concurring opinion of Mr. Justice Douglas in *Lombard*. However, in their zeal to promote their own ends, plaintiffs have tailored his language in at least one instance by omitting an essential portion of the sentence quoted, so that the part quoted in their brief not only fails to fairly represent the thinking of Mr. Justice Douglas, but on the contrary has the effect of actually misrepresenting what he said. The complete sentence to which we refer is as follows: "But surely Shelley v. Kraemer, supra, and Barrows v. Jackson, supra, show that the day has passed when an innkeeper, carrier, housing developer, or retailer can draw a racial line, refuse service to some on account of color and obtain the aid of a State *in enforcing his personal bias by sending outlawed customers to prison or exacting fines from them.*" 373 U. S., l. c. 280. Plaintiffs omitted the portion we have italicized.

Plaintiffs are fully aware that this case does not involve an attempt by a "housing developer" to send his "outlawed customers" to jail or otherwise punish them with the help of the state. We seriously doubt whether Mr. Justice Douglas' reference to "housing developer" (which plaintiffs emphasize) has to do with a private subdivision developer, as distinguished from a *public* redevelopment project. In any event, nothing in the concurring opinion (which of course is no more than the expression of the views of one Justice) reasonably supports the position taken by plaintiffs.

Peterson v. City of Greenville, 373 U. S. 244, is another sit-in demonstration case which involved the convictions under a state trespass statute of demonstrators who re-

fused to leave the lunch counter areas after being denied service. State action was found in the fact that the City ordinance *required* segregated service and in the use of the state's criminal process to *enforce* such discrimination.

Bell v. Maryland, 378 U. S. 226, is a recent sit-in demonstration case which gave rise to extensive discussion by various members of the Supreme Court. The demonstrators were convicted under Maryland trespass laws after refusing to leave a Baltimore restaurant. The majority of the court did not reach the merits of the case, remanding it to the State court for consideration of whether the convictions should be nullified in view of a superseding change in state law. In the concurring opinion of Mr. Justice Douglas, he pointed out that "We deal here with *public accommodations*—with the right of people to eat and travel as they like and to use facilities whose only claim to existence is *serving* the public" (373 U. S., l. c. 247). Again, Mr. Justice Douglas stressed that there was present in that case state *judicial* action (*enforcement* of trespass statutes which is clearly state action, citing *Shelley v. Kraemer*, 334 U. S. 1, 20). He noted that in *Shelley* there was no state statute which regulated the use of restrictive covenants either by expressly authorizing their use or administratively regulating the matter, so that "only the *courts* of the state were involved." Mr. Justice Douglas significantly added,

> "At the time of the Shelley case there was to be sure a Congressional Civil Rights Act that guaranteed all citizens the same right to purchase and sell property 'as is enjoyed by white citizens' [334 U. S. at 11]. But the existence of that statutory right, like the existence of a right under the Constitution, is no criterion for determining what is or what is not 'state' action within the meaning of the Fourteenth Amendment. The conception of 'state action' has been con-

sidered in the light of the *degree* to which a state has *participated in depriving* a person of a right."

In Mr. Justice Black's dissenting opinion, he expressed the view that the *mere* enforcement of a trespass statute was not of itself sufficient "state action" within the meaning of the Fourteenth Amendment. He distinguished *Shelley v. Kraemer,* stating, "It seems pretty clear that the reason judicial involvement of the restrictive covenants in *Shelley* was deemed state action was not merely the fact that a state court had acted, but rather that it had acted 'to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire *and which the grantors are willing to sell.*' 334 U. S. at 19. In other words, this Court held that state *enforcement* of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy and use *their* property without regard to race or color." (Emphasis supplied.) Thus, the differences between Mr. Justice Douglas and Mr. Justice Black relate only to the *effect* and ultimate purpose of the judicial action taken in a particular case. Both are in essential agreement as to the *necessity* that the state courts *affirmatively* be involved in aiding those guilty of discriminatory practices where no state law or executive officers sanction such practices.

We believe Mr. Justice Black, although in dissent, fairly summarized the existing case law relating to property rights as follows:

> "Thus, the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to 'inherit, purchase, lease, sell, hold, and convey' property, *prohibits a State,* whether through its legislature,

executive, or judiciary, *from preventing the sale* on grounds of the race or color of one of the parties. *Shelley v. Kraemer,* supra, 334 U. S., at 19. (2) Once a person has *become* a property owner, then he acquires all the rights that go with ownership; 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' *Buchanan v. Warley,* supra, 245 U. S., at 74. This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as *both* parties are willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, when one party is unwilling as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then, as this Court emphasized in *Buchanan,* he is entitled to rely on the guarantee of due process of law, that is, 'law of the land,' to protect his free use and enjoyment of property and to know that *only by valid legislation,* passed pursuant to some constitutional grant of power, can anyone disturb [redacted]s free use'' (378 U. S., l. c. 330-331).

We examine the facts alleged in the first amended complaint for the purpose of determining whether under the authorities there is such involvement of the state as to constitute defendants' racially inspired refusal to sell their property to plaintiffs ''state action''.

We start with the admitted fact that the property involved is private property which belongs to defendants, or at least to one of them, and that plaintiffs have no property interest whatever therein. It is further incontrovertible, and the very basis of the action that defendants are unwilling to contract with or to convey any property interest to plaintiffs. This fact immediately distin-

guishes the case from *Shelley v. Kraemer*, and other similar cases, which involved the validity of agreements affecting the rights of a willing seller to deal with a willing buyer and to validly transfer an interest in property.

The property involved in this case was neither leased nor sold by the state or county to plaintiffs. Hence, the right to use public property or facilities is not involved. There is no claim that defendants have accepted any governmental appropriations in aid of their subdivision development. It is incontrovertible that the development is not part of a redevelopment project undertaken by governmental agencies or financed to any extent with public funds. These facts clearly distinguish this case from *Hampton, Derrington, Burton, Smith, Simpkins,* and similar authorities.

Significantly, plaintiffs have carefully refrained from alleging that the subdivision in which they seek to purchase a home is aided by any federally insured financing, and it is clearly implied from the complaint that both the subdivision in question as well as the defendant country club are and will be privately financed, and not involved in any form of federal aid or financial assistance. For such reason Executive Order No. 11063, to the extent it might otherwise be applicable, is without any meaningful significance. In attempting to evade this issue plaintiffs have alleged that *other* subdivisions which were promoted by defendants and which adjoin the subdivision in question have been financed by loans from the Federal Housing Association, and that the subdivision here in question is part of an overall "community" which has been provided by defendants, at least in part by loans insured by the credit of the federal government. However, what defendants may have done in promoting other subdivisions cannot add to plaintiffs' rights with respect to the subdivision here in question, and certainly not with respect to the specific house and lot therein they seek to purchase.

It is plaintiffs' theory as set forth in the complaint that defendants are not simply proposing to sell just a house, but rather "they are building a community" in which, so they claim, "the state is involved from beginning to end, including the licensing of the defendants to engage in business, the zoning of the property, the building and maintenance of streets, sewers, and other public facilities, the enforcement of covenants running with the land to control the continuing use, maintenance, and development of the project."

This "involvement" is set forth in meticulous detail in the complaint as follows: (1) The corporate defendants have been granted the "privilege" of operating in corporate form. So, too, are all other corporations chartered by the State of Missouri. (2) Defendants are licensed to engage in business and have made use of the services of numerous other businesses which are licensed and regulated by the state, such as plumbers, electricians, banks and the like. So, too, do many other private enterprises. The mere fact defendants are licensed by the state to carry on their occupations does not of itself involve the state in the operation of their business. In the words of Mr. Justice Black, dissenting in *Bell v. Maryland*, 378 U. S. 266, 333, "Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices." (3) Defendants are "protected" in their occupations by various state laws and local organizations, in particular zoning laws, banking and lending laws and numerous laws affecting the transfer and development of real property. Whatever this conclusionary allegation may mean, it is evident that the laws referred to are general in their application and confer no special privileges upon defendants. (4) In numerous ways, "the state with its political subdivisions and other administra-

tive agencies, 'contribute' to the conduct of defendants' businesses, including the following: the plans of defendants to accomplish the building of homes ~~must~~ be approved by the Building Commissioner, the Metropolitan Sewer District has furnished and will furnish sewer services to the subdivision, the responsibility for zoning and an overall land use plan is committed to the Planning Commission of St. Louis County and the St. Louis County Council, all transfers of property as well as trust indentures which will embody future restrictions on the use of the subdivision either are or will be recorded in the Office of the Recorder of Deeds, other offices such as the Traffic Department, Highway Department and County Engineer" are available and contribute the time and resources of the County of St. Louis and State of Missouri to the success of Defendants' venture, education for the children of families living in the subdivision are provided by a school district which receives assistance and funds from the State and the taxpayers of the County and State, the Union Electric Company, a licensed utility of the state supplies electricity and electrical equipment to homes in the subdivision, and in addition certifies the homes as "Medalion Homes" which permits the defendants to profit therefrom, and defendants also receive the benefits of services from Laclede Gas Company, another licensed utility company, subject to regulations by the State Public Service Commission.

We see no significant state involvement in any of the foregoing allegations, giving them the most liberal intendment. Public utilities must furnish services to all who qualify, and may not refuse service on the ground that the customer has discriminated against others. In *Hackley v. Art Builders, Inc.*, D. C. Md., 179 F. Supp. 851, 857, it was said, "Most apartment home owners and owners of private houses throughout the State receive water and sewage disposal service from public corporations. This does not

make such owners subject to the same rules as public corporations, or publicly controlled corporations." As to the allegations that the state is involved in the zoning and land use regulations, it is, of course, obvious that these regulations are *restrictions* upon defendants' right to use their land as they choose. Aside from being general in application, such regulations do not confer any rights upon the defendants by the state, but instead take away some of their rights in the exercise of the state's police powers.

The availability of educational facilities to families of purchasers of the property, as well as the availability of various state and county offices in no way involve the state in the conduct of defendants' business. These are facilities and rights available to all citizens without discrimination, and do not in any way aid or abet defendants in the conduct complained of.

Plaintiffs place great stress upon their conclusionary allegations that the subdivision development will be a "complete community", their theory being that it follows therefrom that all the conduct of defendants is comparable to a municipal corporation and subjects them to the same proscriptions as a true municipality. Thus, they urge that defendants intend to and will construct and maintain streets for use by the public in general, much as does a municipality, and that they intend to impose restrictive covenants in the deeds of conveyance which will authorize assessments for street maintenance, garbage collections, and other services similar to those provided by municipalities. Plaintiffs argue that defendants will thereby be invested with governmental powers. It is, of course, true that whenever private individuals are empowered to exercise governmental functions (as in the voting cases, *supra*), they are subject to the same constitutional and statutory limitations upon the exercise of *such powers* as the government itself. But the complaint herein does not touch

upon any conduct of defendants which could fairly be said to be an exercise of a *governmental* function.

Even if it be assumed (and no case so holds) that when a state "permits" (mainly in the sense it does not prohibit) a private person to build streets on his own property and to make contracts which authorize assessments against abutting owners for their maintenance, the private person is thereby carrying on a state function, it does not follow therefrom that the *sale* of his property also becomes a state function.

It may well be that once streets are built, parks set aside and garbage collection provided for by defendants, the residents of this subdivision will be entitled to utilize these services on a non-discriminatory basis. But this is not the question before us. However this question may be answered, plaintiffs have no present right to compel defendants to convey private property to them.

In stressing the fact the streets will be constructed by the defendants, the case of *Marsh v. Alabama,* 326 U. S. 50, is cited. *Marsh* involved the exercise of the right of free speech on a privately owned street in public use. The Supreme Court held that "[o]wnership (of property) does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for *use by the public in general,* the more do his rights become circumscribed by the statutory and constitutional rights of the persons *using* it."

Here, plaintiffs make no contention either that they are or will be barred from using the streets which defendants will build and maintain or which the trustees to be named in the future will maintain. Defendants have never sought in any way to limit plaintiffs' peaceful or constitutionally authorized activities on the privately owned streets or sidewalks of the subdivision. Yet, it is only the *streets* which are or will be opened by defendants for use by the public

in general. There is no reasonable basis for contending that the lots owned by defendants on which houses have been or will be constructed abutting the private streets are intended to be used by the public in general. To the contrary, although defendants do solicit the public through advertisements and otherwise in order to obtain purchasers therefor, and such purchasers will be members of the general public, nevertheless the house and lot in each instance is intended to be used only by the individual purchaser thereof.

In all the sit-in demonstration cases in which *Marsh* was either cited or followed, it is evident that the property the court had reference to (in connection with the alleged trespassing) was the property on which the businessman was conducting his business, the very property which he opened up to the public for *use* in connection with his business activities. It followed therefrom that the businessman did not necessarily have a right to the assistance of the state in evicting from his property a person who entered thereon as a member of the public seeking to obtain the very service which he provided therein.

There is no allegation in the first amended complaint that plaintiffs have been evicted from the place of business operated by defendants, nor that either of them was arrested, nor that the state in any way used its judicial branch for the purpose of aiding defendants in discriminating against them. The state has not intervened to assist defendants. When all is said and done, the complaint clearly demonstrates that defendants did no more than politely refuse to enter into a contract of sale with plaintiffs. The actions of defendants are neither required nor affirmatively sanctioned by the state. It has maintained a policy of strict neutrality. Even in the sit-in demonstrations there is no intimation that (prior to the Civil Rights Cases of 1964) the proprietors of the restaurants would

have been subject to a damage action for refusing to serve the demonstrators. All that the Supreme Court held in these cases is that the state could not aid or participate in such refusal. (Of course with the passage of the Civil Rights Act of 1964, the situation insofar as places of public accommodation are concerned has been changed.)

Taking as the crucial test of state action the *actuality of state involvement,* we find that under the facts well pleaded there has been no such involvement as to make the acts of the defendants herein state action. What we have here is individual action. Defendants are not here seeking judicial enforcement of any discriminatory restrictive covenant. If the defendants' refusal to sell their privately owned property to plaintiffs is violative of any right of plaintiffs, their remedy is not in this court. In the absence of federal legislation dealing with the problem, this court has no jurisdiction to redress plaintiffs' alleged grievances.

The Civil Rights Act of 1964 does not confer any right of action upon a person with whom a property owner refuses to contract for the sale of his property. *Heart of Atlanta Motel, Inc. v. United States,* 379 U. S. 241, sustained in 1964 Act on the "basis of the commerce clause." The court stated that the applicability of that Act "is carefully *limited* to enterprises having a substantial relation to the interstate flow of goods and people, except where state action is involved." Except in situations involving state action, the Civil Rights Act of 1964, insofar as here relevant, pertains to places of public accommodation. We note that Mr. Justice Black in his concurring opinion (379 U. S., l. c. 278), referring to his dissenting opinion in *Bell,* supra, says that what he there stated was only that "the Fourteenth Amendment in and of itself, *without any implementation* by a law passed by Congress, does not bar racial discrimination in privately owned places of business in the absence of state action."

And Mr. Justice Douglas in his concurring opinion (379 U. S. 280) also referring to his concurring opinion in *Bell*, supra, states that his position is that "the right to be free of discriminatory treatment (based on race) *in places of public accommodation*—whether intrastate or interstate—is a right guaranteed against *state action* by the Fourteenth Amendment and that state *enforcement* of the kind of trespass laws which Maryland had in that case was state action within the meaning of the Amendment." He also called attention to the definition of "state action" in the Civil Rights Act of 1964, which defines it, inter alia, as discrimination "*enforced* by officers of the state."

Neither the Commerce Clause nor the nature of plaintiffs' employment confer upon them any additional rights to compel an unwilling seller to convey his property to them in the absence of a statute so requiring. *Atlanta Motel* would not have been decided as it was but for the *explicit* provisions of the Civil Rights Act of 1964. The determination of when and the circumstances under which interstate commerce is to be regulated is initially for the Congress, not the Courts. Unless and until Congress acts, there is no need (and indeed, no right) for us to determine whether a federal fair housing act would constitute a valid exercise of the right of Congress to regulate commerce between the states. It is sufficient, for present purposes, that such legislation has not been enacted.

Plaintiffs do not contend that the state has given any affirmative support whatever to defendants' racially discriminatory practices. The case presented is that of a property owner who has for reasons of his own declined to convey a part of his property to a person seeking such a conveyance.

Neither the fact that defendants own more than one parcel of property, nor the fact that the various parts of the property are being offered for sale to others as part

of an overall plan to which the State in any of its manifestations is not a party, does not alter the basic question we here answer in the negative, namely, Does this court have the power either to compel defendants to transfer title to their property against their will or be answerable for damages for their refusal to do so?

We hold that under present law, plaintiffs' first amended complaint fails to state a claim over which this court has jurisdiction. Defendants' motion to dismiss must be and is hereby sustained.

Dated this 18 day of May, 1966.

/s/ John K. Regan,
United States District Judge.

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 18,473. September Term, 1966.

Joseph Lee Jones and Barbara Jo Jones,

Appellants,

vs.

Alfred H. Mayer Company, a Corporation, Alfred Realty Company, a Corporation, Paddock Country Club, Inc., a Corporation, and Alfred H. Mayer, an Individual and an Officer of the Above Corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 26, 1967.

OPINION OF THE UNITED STATES COURT OF APPEALS.

United States Court of Appeals
For the Eighth Circuit.

No. 18,473.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 26, 1967.]

Before Blackmun, Mehaffy and Lay, Circuit Judges.

Blackmun, Circuit Judge.

This case comes close to raising nakedly the question whether, in the absence of federal and state open housing legislation, an owner of a home, which is on the market for sale, may refuse to sell that home to a willing purchaser merely because that purchaser is a Negro. The district court has phrased the sensitive issue, in the case's factual context, as follows:

> "[T]he issue is whether the willful refusal of an owner of private property who is developing a private subdivision thereon to sell a part of his property to a Negro solely because of race entitles the person so discriminated against, under any presently applicable federal law, either to damages or to a mandatory injunction or both."

The case is here by way of an appeal by the plaintiffs from the dismissal of their complaint for failure to state a cause of action. Judge Regan's comprehensive memorandum is reported as *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E. D. Mo. 1966). We are favored with help-

ful briefs by the parties and by the National Committee Against Discrimination in Housing which, as amicus curiae, urges reversal particularly in the light of the Civil Rights Act of 1866 and its present codification as 42 U. S. C. § 1982. Jurisdiction is established under 28 U. S. C. § 1343 (3) and (4).

A. *The Facts.* Because the motion to dismiss was granted, the facts, so far as this appeal is concerned, are those well pleaded in the complaint. *Cooper v. Pate,* 378 U. S. 546 (1964); *Jenson v. Olson,* 353 F. 2d 825, 828 (8 Cir. 1965); *Bonnot v. Congress of Independent Unions,* 331 F. 2d 355 (8 Cir. 1964); *McCleneghan v. Union Stock Yards Co.,* 298 F. 2d 659, 662-63 (8 Cir. 1962).

The plaintiffs, Joseph Lee Jones and Barbara Jo Jones, are husband and wife. Joseph Lee Jones is a Negro. Both are federal employees and Missouri citizens. The defendants, four in number, are Alfred H. Mayer Company, a corporation engaged in the business of developing subdivisions in Saint Louis County, Missouri, and of constructing homes to be sold to the public; Alfred Realty Co., a Missouri licensed[1] corporate real estate broker acting as the exclusive sales agent for Mayer houses; Alfred H. Mayer who owns the controlling interest in both corporations, who is their managing officer, and who also is licensed by Missouri as a real estate salesman; and Paddock Country Club, Inc., a corporation controlled by the other defendants "for the primary use and benefit of the people in" Paddock Woods, a subdivision which the defendants are presently developing.

In June 1965 plaintiffs were looking for a new home and, in consequence of an advertisement in the St. Louis Post-Dispatch, went to Paddock Woods, picked up a bro-

[1] Presumably pursuant to V. A. M. S., ch. 339, and particularly §§ 339.020 and .030.

chure describing the development there, and inspected display homes on the site. They determined that a certain style of house suited their needs and resources and was reasonably accessible to their places of employment. According to the defendants' promotional material this house could be built and sold for $28,195. The plaintiffs selected a lot as their first choice among those available in the subdivision. The defendants, through their agents, "refused to consider Plaintiffs' application to purchase a house and to enter into a contract for the sale of a house and lot, because Joseph Lee Jones is a Negro, and it is Defendants' general policy not to sell said houses and lots to Negroes".

The complaint also recites: Paddock Woods includes more than 100 projected homes, with more plots to be opened. The ultimate result will be a suburban community of about a thousand people "living in an area chosen by Defendants for development, residing in homes designed and built by Defendants, driving on streets built by Defendants, playing golf on the nearby eighteen (18) hole course built by Defendants for the convenience of residents of [this and other nearby subdivisions developed by Defendants], and enjoying the facilities of the nearby bath and tennis club which Defendants plan to open * * * for the exclusive use of residents of Paddock Woods".

The complaint further alleges state and municipal involvement by the Missouri incorporation of the three corporate defendants; the protection afforded the defendants "by various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property"; the approval of plans by the county building commissioner; the furnishing of sewer service by the metropolitan district; the responsibility of the planning commission for zoning; the county recording of trans-

fers and restrictions; the availability of the traffic and highway departments and the county engineer; the education of children in a tax supported school district; and the furnishing of electric and gas services by state licensed utilities. It is also alleged that Paddock Woods is "enlarged" by the defendants' other nearby developments "all of which are financed by loans insured by the Federal Housing Administration".

There is no allegation of federal or state monetary assistance in the development of the Paddock Woods subdivision. The amicus brief states flatly that "it is conceded for this appeal that defendants have not accepted any form of direct state or federal aid or financing which might have subjected them to federal statutes or executive orders or constitutional provisions which bar recipients from engaging in discrimination based on race in using the benefits of such aid in their project".

The prayer asks for $50 ordinary damages, $10,000 punitive damages, and injunctive relief.

It is against these facts that the defendants' motion to dismiss was filed.

B. *The Grounds Asserted.* The complaint alleges violation of rights under the Civil Rights Acts of 1866, 1870 and 1871, from which 42 U. S. C., §§ 1982, 1981, and 1983, are respectively derived; under §§ 201 to 207 of the Civil Rights Act of 1964, 42 U. S. C., §§ 2000a to 2000a-6, relating to public accommodations; under Executive Order No. 11063, entitled "Equal Opportunity in Housing", 27 F. R. 11527 (1962); under the Thirteenth and Fourteenth Amendments; and under the enabling clause of Article I, § 8, and the supremacy clause of Article VI of the Constitution. The 1964 Act and the Executive Order, however, are not urged on the appeal.[2]

[2] The Public Accommodations Subchapter of the 1964 Act relates to "any place of public accommodation" as therein defined,

The plaintiffs argue that the complaint states facts which constitute a violation of rights, guaranteed to them by § 1982, to purchase property without discrimination; (2) that § 1982 is valid and applicable whether or not "state action" is involved; and (3) that, in any event, the discrimination suffered by the plaintiffs results from state action. The amicus argues similarly, stresses that § 1982 is applicable here without regard to the presence of any indicia of state action, and relies particularly on the legislative history. It urges that there is an "imperative need for speedy federal action to help break down the walls of housing prejudice"; that the use of federal and state power "cannot wait for a reluctant Congress"; that "Builders of white suburban communities must not be allowed to spread the plague of housing segregation"; and that "since 1866 there has been federal legislation which bars racial discrimination in the sale or lease of real property". The amicus views the issue of the applicability here of § 1982 as "a novel issue, never before presented to the federal courts".[3]

The appeal, thus, pivots primarily on § 1982.

The defendants, in response, claim that the plaintiffs, in order to make a case under the section, must show that state action is present and that the facts alleged do not constitute conduct involving state action.

C. The Statutes. These read:

"§ 1982. Property rights of citizens

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed

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that is, to hotels, restaurants, theatres, and the like. The Executive Order, Section 101, concerns functions of the executive branch of the federal government which "relate to the provision, rehabilitation, or operation of housing and related facilities". It seems obvious that neither has direct application here.

[3] See, however, Justice (now Judge) Edgerton in dissent in *Hurd v. Hodge*, 162 F. 2d 233, 235, 240-41 (D. C. Cir. 1947).

by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

"§ 1981. Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"§ 1983. Civil Action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

D. *The Chronology.* The history of § 1982, of the companion §§ 1981 and 1983, and of the Thirteenth and Fourteenth Amendments, is not without interest and significance and we examine it.

1. The Thirteenth Amendment ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction", plus an enabling section) was certified by the Secretary of State on December 18, 1865. 13 Stat. 774.

2. The first of the civil rights statutes was the Act of April 9, 1866, ch. 31, 14 Stat. 27.[4] It is evident from its language that this statute is the precursor of both the present § 1982 and § 1981. It has been recognized that the Act, which was passed over the first President Johnson's veto within four months after the Thirteenth Amendment became effective, came about "by virtue of this amendment". *United States v. Harris*, 106 U. S. 629, 640 (1882); Civil Rights Cases, 109 U. S. 3, 22 (1883); *United States v. Morris*, 125 F. 322, 323 (E. D. Ark. 1903).

3. The Fourteenth Amendment (citizenship; privileges and immunities; due process; equal protection; other provisions; and an enabling section) passed the United States Senate on June 8, 1866, and the House on June 13 of that year, and thus was proposed on the latter date. Cong. Globe, 39th Con., 1 Sess., 3042, 3148-49. It was certified finally by the Secretary of State on July 28, 1868.

It is thus at once apparent that the 1866 statute was enacted prior to the formal proposal of the Fourteenth Amendment. This fact has been judicially noted. *United States v. Price*, 383 U. S. 787, 804 (1966); *Hurd v. Hodge*, 334 U. S. 24, 32 (1948); *Oyama v. California*, 332 U. S. 633, 640 (1948); Civil Rights Cases, supra, p. 22 of 109 U. S.;

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[4] *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

County of San Mateo v. Southern Pac. R. R., 13 F. 145, 149 (C. C. D. Cal. 1882, Mr. Justice Field); Slaughter-House Cases, 83 U. S. (16 Wall.) 36, 83, 91 (1872), Mr. Justice Field dissenting.

4. The second civil rights statute was the Enforcement Act of May 31, 1870, ch. 114. Section 16 of that Act, 16 Stat. 144, did not include the words "to inherit, purchase, lease, sell, hold, and convey real and personal property", which were in the 1866 statute, but otherwise did contain, with minor exceptions immaterial here, the earlier Act's language now found in §1981. The Supreme Court has characterized §16 as "patterned after §1 of the Civil Rights Act of 1866". *Hurd v. Hodge*, supra, p. 31 of 334 U. S., footnote 7. Moreover, §18 of the 1870 Act provided flatly that the 1866 Act "is hereby re-enacted". The resulting codification effect, therefore, appears to have been the separation of the property right guaranties for non-white citizens from the more generally stated equality provisions.

It has been noted that there were doubts in some quarters as to the constitutional validity of the 1866 Act; that the first section of the Fourteenth Amendment had as one of its purposes the elimination of such doubts; and that those doubts were removed by the amendment. *Hurd v. Hodge*, supra, pp. 32-33 of 334 U. S., and Mr. Justice Field dissenting in the Slaughter-House Cases, supra, pp. 93 and 97 of 83 U. S. (16 Wall.), and in Ex Parte Virginia, 100 U. S. 339, 349, 364-65 (1879), and partially concurring in *Virginia v. Rives*, 100 U. S. 313, 324, 333 (1879).

5. Section 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13, was a forerunner of what is now §1983. It provided liability and redress for certain deprivations of civil rights. It referred specifically to the 1866 Act. Its title was "An Act to enforce the Provisions of the Fourteenth Amend-

ment. * * *" The Supreme Court has described the Act as "one of the means whereby Congress exercised the power vested in it by §5 of the Fourteenth Amendment to enforce the provisions of that Amendment". *Monroe v. Pape*, 365 U. S. 167, 171 (1961).

6. The next pertinent and, until 1957, the last civil rights act was that of March 1, 1875, ch. 114, 18 Stat. 335. Its first two sections were declared unconstitutional in the Civil Rights Cases, supra, 109 U. S. 3 (1883).

From this chronology one sees, in summary, that the 1866 Act followed immediately upon the Thirteenth Amendment; that it became law before the Fourteenth Amendment was proposed by Congress; that the Fourteenth Amendment was directed to situations not reached by the Thirteenth or by the 1866 Act, or, at least, only questionably covered by them; that, seemingly, the 1870 and 1871 Acts were an implementation of the Fourteenth Amendment; and that the 1866 statute was reenacted as part of the 1870 Act.

E. *The Fourteenth Amendment's §1 and state action.* There is no question that §1 and its guaranties of privileges and immunities and equal protection are directed at and prohibitive of "state action". The language, "No State shall" and "nor shall any State deprive", is indicative and clear. It would seem to follow that enabling legislation, to the extent it is enacted in enforcement of the Amendment's first section is so to be directed and is so limited. It was on an approach of this kind that the first two sections of the 1875 Act, relating to equal enjoyment of places of public accommodation were held unconstitutional in 1883:

> "The first section of the Fourteenth Amendment * * * is prohibitory in its character, and prohibitory upon the States. * * * It is State action of a par-

ticular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. * * * [U]ntil some State law has been passed, or some State action through its officers or agents has been taken * * * no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity. * * * The wrongful act of an individual, unsupported by any [State] authority, is simply a private wrong, or a crime of that individual." Civil Rights Cases, supra, pp. 10, 11, 13 and 17 of 109 U. S.

Significant state action has been the consistent measuring stick under §1 of the Fourteenth Amendment. *Virginia v. Rives,* supra, p. 333 of 100 U. S.; *United States v. Harris,* supra, pp. 638-39 of 106 U. S.; *Corrigan v. Buckley,* 271 U. S. 323, 330 (1926); *Shelley v. Kraemer,* 334 U. S. 1, 13 (1948); *Hurd v. Hodge,* supra, p. 31 of 334 U. S.; *Burton v. Wilmington Parking Authority,* 365 U. S. 715, 721-22 (1961); *United States v. Guest,* 383 U. S. 745, 754-56 (1966); *United States v. Price,* supra, p. 799 of 383 U. S.; *Reitman v. Mulkey,* —— U. S. —— (1967).

F. *State action and §1982.* Despite the facts of chronological priority of the Act of 1866 over the Fourteenth Amendment and the derivation of §1982 from the 1866 Act, is this section nevertheless infected today with any limitation of scope and application attendant upon the Amendment's first section and federal legislation which enforces it?

There are definite indications in Supreme Court opinions that the 1866 Act and §1982 are subject to the limitations of the Amendment's first section and are not now to be regarded as direct legislation implementing, instead, the Thirteenth Amendment. In *Virginia v. Rives,* supra, p. 333 of 100 U. S., Mr. Justice Field said, "After [the Fourteenth Amendment's] adoption the Civil Rights Act was

re-enacted, and upon the first section of that amendment it rests". In *Ex Parte Virginia*, supra, p. 345 of 100 U. S., the Court said, "They [the Thirteenth and Fourteenth Amendments] were intended to be, what they really are, limitations of the power of the States". The Court in the Civil Rights Cases, supra, p. 16 of 109 U. S., discussed the 1866 Act and its enactment. It referred to the penal portion of the statute and its reference to state law. Although noting, p. 20, that the Thirteenth Amendment was self-executing and authorized enforcement legislation "primary and direct in its character", it observed that the Amendment was concerned with slavery. The Court said, pp. 22-24, that in 1866,

> "Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship. * * * [T]he province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States. * * * The amendments are different, and the powers of Congress under them are different. * * * The Thirteenth Amendment has respect not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its production to races and classes."

The public accommodations legislation then under challenge was held authorized by neither the Thirteenth nor the Fourteenth Amendments. The first Mr. Justice Harlan alone dissented. See *Buchanan v. Warley*, 245 U. S. 60, 78-79 (1917).

In *Corrigan v. Buckley*, supra, it was said, pp. 330-31 of 271 U. S.,

> "The Thirteenth Amendment denouncing slavery and involuntary servitude * * * does not in other matters protect the individual rights of persons of the Negro race. * * * [T]hey [§§1981, 1982, and 1983], like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

Of particular significance is *Hurd v. Hodge,* supra, a case concerning restrictive clauses in private conveyances. Mr. Chief Justice Vinson, in speaking for five of the six Justices who passed on the case, directly related the 1866 Act to the Fourteenth Amendment and spoke of the "close relationship" between the two, "for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve". Both the statute and the joint resolution "were passed in the first session of the Thirty-Ninth Congress. * * * It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy". Pp. 33 and 32 of 334 U. S. This is rather positive language.

There are seemingly contrary implications in *United States v. Morris,* supra, 125 F. 322 (E. D. Ark. 1903), where Judge Trieber made the historical distinction between the Thirteenth Amendment, on the one hand, and the Fourteenth and Fifteenth on the other, and observed, p. 324, "Congress is, therefore, authorized by the provisions of the thirteenth amendment to legislate against acts of individuals, as well as of the states, in all matters necessary for the protection of the rights granted by that amendment". Of like import, perhaps, are the comments of Judge Edgerton, in dissent, in *Hurd v. Hodge,* 162 F. 2d 233, 235, 240-41 (D. C. Cir. 1947).

G. *The expansion of the state action concept.* Although to this date the state action limitation has continued thus to be engrafted upon enabling legislation under the first section of the Fourteenth Amendment, and although we have these indications from the Supreme Court that the limitation applies to the 1866 Act and, consequently, to § 1982, we think we may safely observe, without belaboring the cases, that the Supreme Court and other courts in general have broadly viewed the concept of state action. Indeed, by this breadth of view they have ruled against and struck down discriminatory housing practices in a number of instances.

Shelley v. Kraemer, supra, 334 U. S. 1 (1948), is a leading example. There the Court held that state court enforcement of a private race discrimination agreement amounted to state action. The case involved an attempt to enforce such a restrictive covenant and thereby to void a sale by a willing white seller to a willing negro purchaser. Thus, the right to acquire property, which was "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment", was interfered with, even though "the restrictive agreements, standing alone, cannot be regarded as violative" of Fourteenth Amendment rights. The companion case of *Hurd v. Hodge,* supra, 334 U. S. 24 (1948), concerned a similar restrictive covenant in the District of Columbia. The Court found it unnecessary to resolve the Fifth Amendment issue advanced but held that § 1982 prohibited judicial enforcement of the restrictive covenant. An alternative ground for the decision was national public policy which does not permit the federal court to do in the District what a state court may not do under the Fourteenth Amendment and the holding in *Shelley v. Kraemer.* Later *Barrow v. Jackson,* 346 U. S. 249 (1953), complemented *Shelley* by denying damages for breach of a racially restrictive covenant.

State action has also been found in any significant participation or involvement in property. *Burton v. Wilmington Parking Authority,* supra, 365 U. S. 715 (1961) (privately owned restaurant in a building owned and operated by a state agency for public purposes); *Derrington v. Plummer,* 240 F. 2d 922 (5 Cir. 1956), cert. denied 353 U. S. 924 (cafeteria in a county courthouse); *Buchanan v. Warley,* supra, 245 U. S. 60 (1917) (racial zoning laws); *Pennsylvania v. Board of Directors,* 353 U. S. 230 (board, appointed under a statute, of a school funded by a will); *Evans v. Newton,* 382 U. S. 296 (1966) (city supervision of a park); *Banks v. Housing Authority,* 260 P. 2d 668 (Cal. Dist. Ct. App. 1953) (public housing development); *Smith v. Holiday Inns of America, Inc.,* 336 F. 2d 630 (6 Cir. 1964) (motel on land purchased from housing authority in redevelopment project promoted with public funds); *Ming v. Horgan,* 3 Race Rel. L. Rep. 693 (Cal. Super. Ct. 1958) (FHA and VA insured subdivisions). See *Robinson v. Florida,* 378 U. S. 153 (1964); *Anderson v. Martin,* 375 U. S. 399 (1964); *Lombard v. Louisiana,* 373 U. S. 267 (1963); *Peterson v. Greenville,* 373 U. S. 244 (1963); *McCabe v. Atchison, T. & S. F. Ry.,* 235 U. S. 151 (1914); *Boman v. Birmingham Transit Co.,* 280 F. 2d 531 (5 Cir. 1960); 3 ALR 2d 466; 14 ALR 2d 153.

There are instances in this area where courts have refused to find state action and have denied the requested relief. *Barnes v. City of Gadsden,* 174 F. Supp. 64 (N. D. Ala. 1958), aff'd 268 F. 2d 593 (5 Cir. 1959), cert. denied 361 U. S. 915 (city housing authority carrying out a slum clearance program); *Dorsey v. Stuyvesant Town Corp.,* 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. denied 339 U. S. 981 (low cost housing corporation organized under state redevelopment law); *Johnson v. Levitt & Sons,* 131 F. Supp. 114 (E. D. Pa. 1955) (subdivision developer with mortgages guaranteed by FHA and VA); *Hackley v. Art Builders, Inc.,* 179 F. Supp. 851 (D. Md. 1960) (housing project).

H. *The possible incipient emergence from the shackles of the state action limitation.* Over and beyond this generally broad and seemingly expanding approach to the concept of state action are certain indications in recent Supreme Court opinions that state action is shrinking as a factor of deterrent influence in the area of discrimination. The new attitude seems to focus on other provisions of the Constitution or generously on the enabling §5 of the Fourteenth Amendment and congressional action thereunder, rather than on the narrow state-confined feature of the amendment's first section.

Perhaps the first intimation of this is in the companion cases of *Heart of Atlanta Motel, Inc. v. United States,* 379 U. S. 241 (1964), and *Katzenbach v. McClung,* 379 U. S. 294 (1964), where the Court, through the commerce clause, struck down discriminatory practices. The Court there upheld certain portions of the public accommodations title of the Civil Rights Act of 1964, 78 Stat. 241, 243. Section 201 of the Act, 42 U. S. C., §2000a, prohibits discrimination in any place of public accommodation and defines as such a place each of a number of described enterprises "if its operations affect commerce, or if discrimination or segregation by it is supported by State action". As noted, the Court relied on the commerce clause and refrained from passing on the issue of state action. Mr. Justice Douglas, in concurrence, p. 279, was reluctant to rest solely on the commerce clause. He preferred to rest on the Fourteenth Amendment's enabling § 5 and expressed the thought that discrimination enforced by officials of a state or political subdivision thereof is state action. Mr. Justice Goldberg, in concurrence, p. 291, also relied on the Fourteenth Amendment's § 5 as well as the commerce clause.

Mr. Justice Clark, in the primary opinion in *Heart of Atlanta* made specific reference, pp. 250-52, to the Civil Rights Cases and stated that that decision was without

precedential value because the public accommodations provisions of the 1875 Act were not limited to businesses impinging on interstate commerce; because a business which in 1875 was not within the ambit of the commerce power was not necessarily outside it today; and because the government in the Civil Rights Cases had not relied on the commerce power and there is language in the opinion which indicates the Court "did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power".

Of greater significance are the several opinions in *United States v. Guest*, supra, 383 U. S. 745 (1966). That case concerned an indictment for criminal conspiracy, in violation of 18 U. S. C., § 241 ("to injure * * * any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States"), to interfere with the free enjoyment by Negroes of state owned facilities and with their right to travel freely over interstate highways in Georgia. In its primary opinion the Court again acknowledged that the Fourteenth Amendment protected only against state action and not against wrongs by individuals, but said, p. 755, "This is not to say, however, that the involvement of the State need be either exclusive or direct". It held, pp. 756-57, that an allegation of causing Negroes' arrest by means of false reports that they had committed criminal acts was broad enough, as against a motion to dismiss, to cover a charge of connivance by state agents and, pp. 758-59, that the right to travel interstate is a constitutional right, although not explicitly mentioned in the Constitution. This, of course, could be just another example of the broad approach to the state action concept.

However, Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas, separately concurred, p. 761, noting that the court avoided the question whether Congress

could punsh private conspiracies which interfered with Fourteenth Amendment rights. But he observed that, despite the Court's rejection of "any such connotation, * * * there now can be no doubt that the specific language of § 5 [of the Fourteenth Amendment] empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights".

Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, p. 774, was specific. He felt that the statute reached a private conspiracy to interfere with equal utilization of state facilities, for this was interference with a right secured by the Constitution, within the statute's meaning, "without regard to whether state officers participated in the alleged conspiracy." P. 777. The statute was an exercise of congressional power under the Fourteenth Amendment's enabling clause. It prohibits all conspiracies. A right is "secured" by the Constitution "if it finds its source in the Constitution". He acknowledged that "an aspect" of the Civil Rights Cases confined the power of Congress but, p. 783, "I do not accept—and a majority of the Court today rejects—this interpretation of § 5. He concluded that a majority "expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy". P. 782. See, also, the companion case of *United States v. Price*, supra, 383 U. S. 787 (1966), and Mr. Justice Goldberg, concurring, in *Bell v. Maryland*, 378 U. S. 226, 286, 302-03, 305-11 (1964).

Hurd v. Hodge is not cited in *Heart of Atlanta, McClung, Guest*, or *Price*.

These recent opinions imply for us a change of course. Certainly the opinions in *Guest* indicate that the reasoning

of the Civil Rights Cases is in the process of reevaluation, if not overruling, and that a court may not need to stretch to find state action if appropriate congressional legislation is present.

All this leads us at last to the basic issue in the present case. Does § 1982, which is already on the books and which is derived from the Civil Rights Act of 1866, reach discrimination in private subdivision housing?

Three approaches are possible: That of the Thirteenth Amendment; that of the Fourteenth Amendment; and that of relating the private subdivision to a governmental function.

A. The Thirteenth Amendment. It may be argued that the right to purchase real property, a right assured by § 1982, is violated when a seller refuses to do business with a willing Negro purchaser. The Thirteenth Amendment theory here would have to be that such discrimination imposes a "badge of slavery". This is precisely the approach used by Judge Trieber in *United States v. Morris*, supra, 125 F. 322 (E. D. Ark. 1903). He there concluded that under the Thirteenth Amendment Congress has the power to protect the enjoyment of fundamental rights, "if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment". P. 330.

There are, however, difficulties today with this Thirteenth Amendment approach. *United States v. Morris* seems to be the only supporting authority (other than, perhaps, Judge Edgerton's dissent, hereinabove noted, pp. 240-41 of 162 F. 2d). The facts are not too clear, but that case has overtones of the deprivation of a right to pursue a vocation (farming) and thus seems to involve more than

a simple right to purchase a home from an unwilling seller. Further, the reasoning in *Morris,* despite its having been decided later and despite its citation of the Civil Rights Cases, is basically contrary to the Civil Rights Cases where it was stated, pp. 21-25 of 109 U. S., that the denial of access to public accommodations was not the imposition of a badge of slavery. Also, *Hurd v. Hodge,* supra, so long as it stands free and unmolested in the reports, gives us great difficulty. As we have noted, the Supreme Court there stressed the 1870 reenactment and imposed upon § 1982 a distinct and definite Fourteenth Amendment overlay with the state action limitation. While we feel that the implications of *Hurd v. Hodge* could be regarded as greatly offended and restricted by the sweep of the language in *United States v. Guest,* the Supreme Court did not itself express concern about *Hurd v. Hodge* and, indeed, did not even cite it. It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law.

B. The Fourteenth Amendment. Section 1982 was reenacted under the authority of the Fourteenth Amendment. Clearly, therefore, the right to purchase property may not be encroached by state action. It is perhaps arguable that under the *Guest* rationale this right may not be violated by purely private action.

But what is this right to purchase? It is usually taken for granted that an owner may turn down any inquiring purchaser; in this sense there is no difference between a right to purchase possessed by a Negro and that possessed by a white. However, when the owner puts his property on the market, perhaps there is a difference. If it is placed on the market for whites only, whites have

a right denied to Negroes. A right to purchase will be of limited scope if it can be denied or destroyed by those who place property on the market. See Robison, *The Possibility of a Frontal Attack on the State Action Concept*, 41 Notre Dame Law 455 (1966).

On the other hand, there is a significant historical fact in all this. Clearly, one of the purposes of the Thirteenth and Fourteenth Amendments and of the 1866 Act and of § 1982 was to give the Negro citizenship and the right to own property and thus to acquire and to dispose of it. These were abilities which he did not possess under slavery. They are more fundamental than an ability to purchase from a seller. No one here challenges the right of these plaintiffs to own or to acquire real property. That purpose of the Amendments has been entirely fulfilled. But the plaintiffs claim a right to purchase a particular piece of property when the owner places it on the market. Is this, too, something which the Fourteenth Amendment goes so far as to reach?

There is another and opposing factor which deserves comment. A Fourteenth Amendment argument may have greater force in the case of the large real estate developer. He is in the business of selling homes and occupies a position somewhat different than that of the individual home owner. And a collateral supporting thesis was presented by Mr. Justice Douglas in his concurrences in *Garner v. Louisiana*, 368 U. S. 157, 176, 185 (1961), and in *Reitman v. Mulkey*, supra, where he asserted that when a business is licensed it is because the business is affected with a public interest; that the public, as a consequence, has rights in respect thereto; and that it would be unconstitutional for the state to license a public business for the use of one race only. Yet licensing and subdivision factors alone were not deemed to be "exertions of state power" even in *Ming v. Horgan*, supra.

Thus, the Fourteenth Amendment's approach presents us with difficulties.

C. Governmental function. The argument is that a housing development, even though privately financed and built, is in effect the equivalent of a municipality and, thus, the private developer is carrying on a governmental function requiring the application of non-discriminatory standards. It is said that the state plays an important part in the success of the private housing development. It does so by way of licensing and regulation of the real estate business; zoning laws and building codes; required approval of subdivision plans; schools; utilities; police and fire services; and the like. In the private development a board of trustees usually manages the community, holds title to the streets, levies assessments for community services, and provides recreational facilities. It is asserted, then, that it is a denial of equal protection for the state to allow private persons discriminatorily to carry out what are governmental functions. See *Marsh v. Alabama,* 326 U. S. 501 (1946), where the Court imposed First and Fourteenth Amendment freedom of religion and press guaranties upon a company-owned town, and the white primary cases. *Nixon v. Condon,* 286 U. S. 73 (1932); *Smith v. Allwright,* 321 U. S. 649 (1944); *Terry v. Adams,* 345 U. S. 461 (1953), where the Court imposed the Fifteenth Amendment guaranty upon private political parties performing state election functions. The relationship of ownership of real property to the sovereignty of the state may also be stressed.

The difficulties with any application of the governmental function argument are that, to a large extent, it relies on state inaction, rather than state action, see *Mulkey v. Reitman,* 64 Cal. 2d 529, 413 P. 2d 825, 834 (1966), affirmed —— U. S. ——; it relies upon state assistance which is non-discriminatory in itself; and it necessarily concerns

the ever elusive judicial determination, as contrasted with a legislative one, of what is a governmental function.

It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind. It could do so by asserting that § 1982 was, because of its derivation from the Thirteenth Amendment, free of the shackles of state action despite what has been said in *Hurd v. Hodge*. It could do so by asserting that, even though § 1982, because of its reenactment, was subject to Fourteenth Amendment limitations, we nevertheless have, on the accepted facts here, enough to constitute state action in the light of the expanding concept of that term. And it could do so on the ground, suggested in *Guest*, that state action is no longer a factor of limitation and that Congress has acted through § 1982 to reach private discrimination in housing.

We feel, however, that each of these approaches, at the present time, falls short of justification by us as an inferior tribunal. The Thirteenth Amendment approach has been made hazy and obscure by the 1870 reenactment and by the pronouncements in *Hurd v. Hodge*. The Fourteenth Amendment approach still carries the condition of state action. And the governmental function approach finds little helpful majority precedent in a legion of decided cases. Those where relief has been granted involve factual elements of far greater depth and significance than are present here. On this complaint we do not even have the thin gloss of governmental agency mortgage service in Paddock Woods.

Relief for the plaintiffs lies, we think, in fair housing legislation which will be tempered by the policy and exemption considerations which enter into all thoughtfully considered statutes. Recent cases indicate that, if properly drawn, such legislation would encounter little constitutional objection. *United States v. Price*, supra, p. 789 of

383 U. S.; *Colorado Anti-Discrimination Comm'n v. Case*, 380 P. 2d 34 (Colo. 1962); *Massachusetts Comm'n Against Discrimination v. Colangelo*, 344 Mass. 387, 182 N. E. 2d 595 (1962). The power exists but its exercise is absent. The matter, thus, is one of policy, to be implemented in the customary manner by appropriate statutes directed to the need. If we are wrong in this conclusion the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us.

A concluding word is indicated about the Supreme Court's very recent five to four decision in *Reitman v. Mulkey*, supra, —— U. S. —— (1967), concerning California's Proposition 14, added by initiative to that State's Constitution. The majority there concluded that positive state action "embodied in the State's basic charter, immune from * * * regulation at any level of the state government", as the California Supreme Court had found, was present and, being discriminatory, was violative of the Fourteenth Amendment. Mr. Justice Douglas, in concurrence, went further and, while perhaps recognizing that the situation might be different in "a case as simple as the one where a man with a bicycle or a car or a stock certificate or even a log cabin asserts the right to sell it to whomsoever he pleases", felt that the Court was dealing "with a problem in the realm of zoning", that "urban housing is in the public domain", and that "Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which *Shelley v. Kraemer*, supra, can be construed". The four dissenters, although conceding that the adoption of Proposition 14 by initiative constituted "state action", concluded that it embraced no affirmative and purposeful governmental enforcement which fostered discrimination and that, as a consequence, there was no impermissible deprival of equal protection.

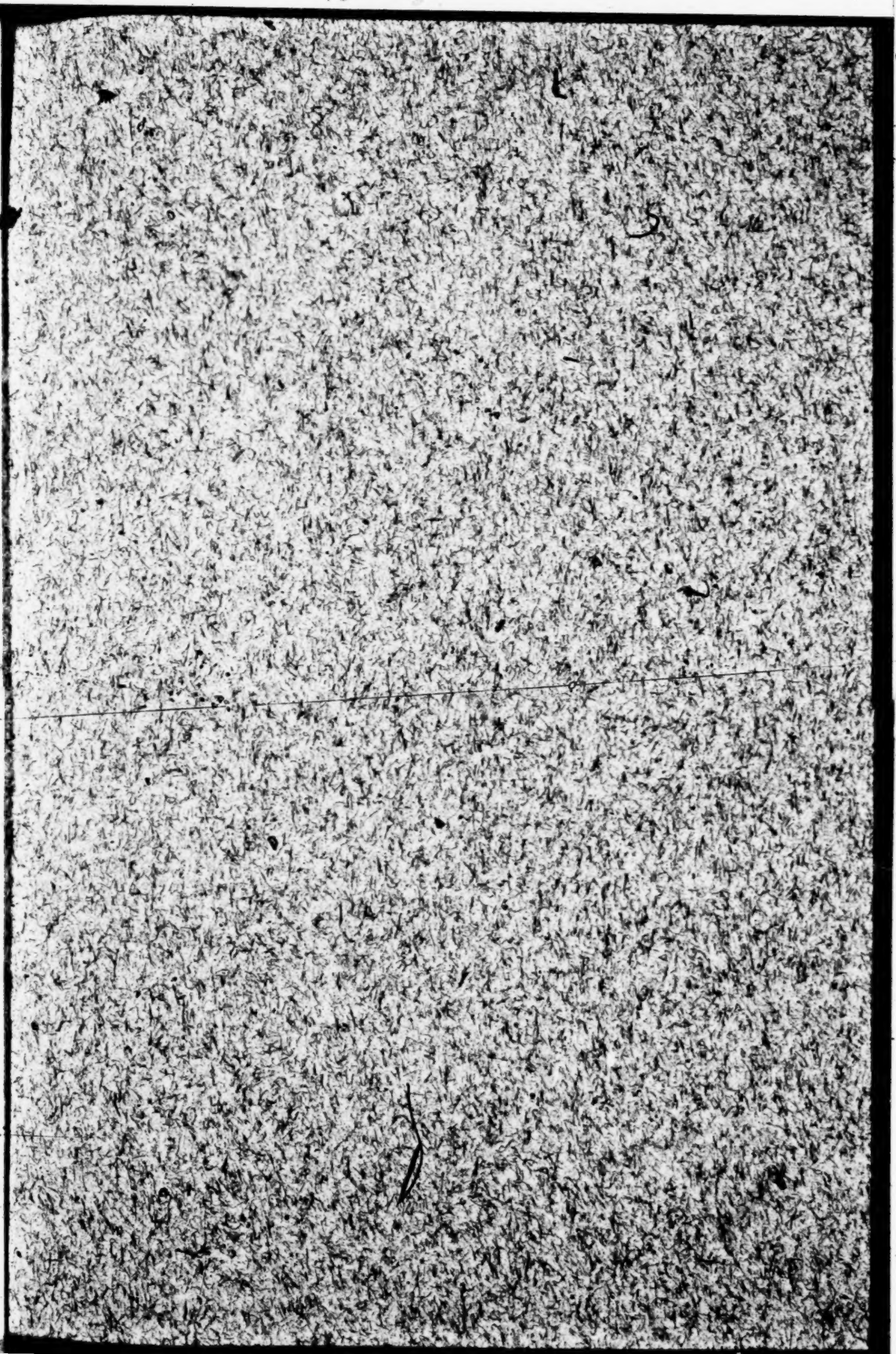
We therefore must assume that, because of licensing by Missouri of the defendants Alfred H. Mayer and Alfred Realty Co. as a real estate salesman and broker, Mr. Justice Douglas would conclude that our affirmance of the district court here is error. We feel, however, that the four dissenters, who were unimpressed with the fact of California licensing in *Reitman v. Mulkey*, would be unimpressed with the fact of Missouri licensing here and would not find impermissible state action in the legislative vacuum of the present case. And we believe that the four members of the *Reitman* majority, who did not join Mr. Justice Douglas in the grounds stated for his concurrence, also would not be inclined to find much substance, so far as the present issue is concerned, in Missouri's licensing of the Mayers. We therefore conclude that our decision to affirm the district court in the present case is in line with the implications flowing from both the majority and the dissenting opinions in *Reitman v. Mulkey* and, indeed, is compelled by those opinions. The views entertained by Mr. Justice Douglas, of course, would require the opposing result.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.



IN THE

Supreme Court of the United States

October Term, 1967

SEP 22 1967

JOHN F. DAVIS, CLERK

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on June 26, 1967.

Opinions Below

The memorandum opinion of the District Court for the Eastern District of Missouri, printed at R. 14, is reported at 255 F. Supp. 115. The opinion of the Court of Appeals for the Eighth Circuit issued on June 26, 1967, printed in Appendix B hereto, is reported at 379 F.2d 33.

Jurisdiction

The judgment and opinion of the Court of Appeals for the Eighth Circuit, printed in Appendix B hereto, was entered on June 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

The questions presented are:

1. Whether the refusal of respondents, owners of residential developments, to sell a lot and house, otherwise on the market, to petitioners solely because of their race is prohibited:

   A. Under the Civil Rights Act of 1866, enacted under the Thirteenth Amendment, or

   B. Under the Civil Rights Act of 1866 as re-enacted in 1870 under the Thirteenth and Fourteenth Amendments, or

   C. Under the terms of the Thirteenth and Fourteenth Amendments, aside from any federal statutes?

2. Whether the said discriminatory refusal to sell is unlawful, regardless of the existence or degree of state involvement?

3. Whether the state has sufficiently involved itself in the said discriminatory refusal to sell:

   A. By its various intertwining acts with respondents, such as licensing, zoning, regulating, and other-

wise promoting and assisting the respondents' development, or

B. By its delegation of municipal functions to respondents, or

C. By a combination of these factors

so as to make said refusal unlawful?

Statutes and Constitutional Provisions Involved

The statutes and constitutional provisions involved are:

The Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 18 of the Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 144, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13, codified in Title 42, U.S.C., Sec. 1983.

Sections 1 and 2 of the Thirteenth Amendment to the Constitution.

Sections 1 and 5 of the Fourteenth Amendment to the Constitution.

All these are set forth in Appendix A, *infra*, pp. 1a-15a.

Statement Under Rule 33 (2) (b)

Since the courts below draw into question the constitutionality of the Act of April 9, 1866, 14 Stat. 27, the Act of May 31, 1870, 16 Stat. 144, and the Act of April 20, 1871, 17 Stat. 13, as codified in Title 42, U.S.C. Secs. 1981, 1982 and 1983, Acts of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. Sec. 2403 may be applicable.

No court of the United States as defined by 28 U.S.C. Sec. 451 has, pursuant to 28 U.S.C. Sec. 2403, certified to the Attorney General the fact that the constitutionality of such Acts of Congress have been drawn in question.

Statement

The case was filed in the District Court of the Eastern District of Missouri seeking relief under the Civil Rights Acts of 1866, 1870 and 1871 as revised in 42 U.S.C. Secs. 1981, 1982 and 1983 and under the Thirteenth and Fourteenth Amendments to the Constitution. The District Court had jurisdiction of the cause under 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 1331, 1337 and 1343.

Inasmuch as this case arises from the affirmance by the Court of Appeals of the order of the District Court sustaining the respondents' motion to dismiss petitioners' first amended complaint, the facts pleaded by petitioners in their first amended complaint (R. 1-11)* must be taken as true.

* References to the Record on Appeal are designated by R.

Petitioners Joseph Lee Jones and Barbara Jo Jones are husband and wife who, in June of 1965, in consequence of an advertisement in the St. Louis Post-Dispatch, went to a subdivision known as Paddock Woods in St. Louis County, Missouri, in order to consider the purchase of a lot and home. After inspecting the display houses, petitioners decided that a particular type of home was well suited to their personal needs, convenient to their places of employment with agencies of the Government of the United States, and within their financial range (R. 3-4).

Paddock Woods is a subdivision, owned and developed by the Alfred H. Mayer Company, a corporation engaged in the business of developing subdivisions in St. Louis County, including, not only Paddock Woods, but neighboring subdivisions known as Paddock Estates, Paddock Meadows and Wedgewood. Alfred Realty Company is a corporation licensed as a real estate broker by the State of Missouri, which is the exclusive sales agent for the homes in these subdivisions. Alfred H. Mayer, also licensed as a real estate broker by the State of Missouri, owns a controlling interest in and is the managing officer and guiding policy maker of both Alfred H. Mayer Company and Alfred Realty Company. Paddock Country Club, Inc., the other respondent, is a corporation controlled by the other respondents, which operates a golf course for the use of residents of the said "Mayer" subdivisions (R. 1-3; 7-9).

After petitioners Joseph and Barbara Jones had picked out a lot and home in Paddock Woods which they wished to order and purchase, the respondents refused to sell them the house and lot because of the fact that Joseph Jones is a

Negro, and because it is the respondents' general policy not to sell said houses and lots to Negroes (R. 4, 9-10).

The governmental connections of the State of Missouri, its political subdivisions, and their various agencies with respondents and their housing subdivisions here involved are detailed in paragraphs 7 and 8 of the first amended complaint (R. 5-9). The allegations therein show a multiple panoply of state action. Not only are the respondents themselves incorporated and licensed by the State of Missouri, but they also use the services of other state licensees, and of state and municipal offices (including the Building Commission, the Planning Commission, the Recorder of Deeds, the Sewer District, the County Engineer and the Highway Department), and have had delegated to them the right and power to control and regulate the entire subdivision during its construction and, thereafter, by means of restrictive covenants and quasi-taxing power, to assess and lien against residents for community-wide services.[1]

Decisions of the Courts Below

The District Court, upholding a motion to dismiss by respondents, ruled, "It is now well settled that these civil rights statutes are directed toward governmental action" (R. 17). Thus it disposed of the plaintiffs' contention that the Civil Rights Act of 1866 barred discrimination based on race in the sale of housing. The Court then ruled that under the facts alleged there was no state action involved in the refusal to sell, and that this case involves only an individual invasion of the civil rights of the petitioners. The

1. See also, *infra*, pages 21-27.

Court distinguished numerous cases cited by petitioners on the ground that those cases involved the use of public property or facilities, whereas the present case, it held, involves only the refusal to sell private property (R. 32, 38).

Petitioners' argument that the state had in fact clothed the respondents with municipal powers in the building of this subdivision was rejected by the District Court for the reason that, "No governmental power or functions are involved in the sale of private property, a lot in a private subdivision." (R. 27).

The Court of Appeals affirmed the District Court. But in so doing it reflected a reluctance to do so and implied doubt as to the correctness of some of the reasoning of the Court below, especially with respect to the applicability of the Fourteenth Amendment to the Civil Rights Act of 1866. Thus the Court of Appeals, in contrast to the District Court which sought only for "governmental action", phrased the basic issue as "Does Sec. 1982, which is already on the books and which is derived from the Civil Rights Act of 1866, reach discrimination in private subdivision housing?" (379 F.2d 33 at 42-3)

Although the Court recognized that the "state action" doctrine as stated in the Civil Rights Cases, 109 U. S. 3 (1883), had been re-evaluated if not overruled by more recent decisions of the Supreme Court, in particular, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241 (1964), *Katzenbach* v. *McClung,* 379 U. S. 294 (1964), and *United States* v. *Guest,* 383 U. S. 745 (1966) (379 F.2d 33, at 41-2), it was troubled by the dictum in *Hurd* v. *Hodge,* 334 U. S. 24 (1948), at 31 and 32, which noted that the Civil

Rights Act of 1866 and Fourteenth Amendment were "closely related," which is interpreted as stating that Sec. 1982, although enacted in the first instance under the Thirteenth Amendment and before the proposal and ratification of the Fourteenth Amendment, was still infected by some requirement of state action as a condition of its applicability. The Court finally stated:

> "While we feel that the implications of *Hurd* v. *Hodge* could be regarded as greatly offended and restricted by the sweep of the language in *United States* v. *Guest*, the Supreme Court did not itself express concern about *Hurd* v. *Hodge* and, indeed, did not even cite it. It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law." (379 F.2d 33 at 43)

The Court of Appeals did not take the position that Congress was without power under the Constitution to enact legislation against private discrimination in housing. To the contrary, it said at p. 45:

> "The [legislative] power exists but its exercise is absent. The matter, thus, is one of policy, to be implemented in the customary manner by appropriate statutes directed to the need. If we are wrong in this conclusion the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us."

Thus it apparently rejected the view that the Fourteenth Amendment's limitation to state action applied to limit any

civil rights laws adopted by Congress. The Court concludes its discussion of this issue simply by stating:

> "* * * the plaintiffs claim a right to purchase a particular piece of property when the owner places it on the market. Is this, too, something which the Fourteenth Amendment goes so far as to reach?" (at p. 44)

The Court of Appeals was also more hesitant than the District Court in rejecting petitioners' contention that the state is substantially involved in respondents' subdivision in that the state allowed respondents to carry out governmental functions in a discriminatory manner. The Court stated:

> "The difficulties with any application of the governmental function argument are that, to a large extent, it relies on state inaction, rather than state action, see *Mulkey* v. *Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 834 (1966), affirmed 387 U.S. 369; it relies upon state assistance which is non-discriminatory in itself; and it necessarily concerns the ever elusive judicial determination, as contrasted with a legislative one, of what is a governmental function." (at p. 44)

The Court of Appeals manifested its uncertainty and its difficulties in affirming the District Court in this way:

> "It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind. It could do so by asserting that Sec. 1982 was, because of its derivation from the Thirteenth Amendment, free of the shackles of state action despite what has been said in *Hurd* v. *Hodge*. It could do so by asserting that, even though Sec. 1982, because of its reenactment, was subject to Fourteenth Amendment limitations, we nevertheless

have, on the accepted facts here, enough to constitute state action in the light of the expanding concept of that term. And it could do so on the ground, suggested in *Guest,* that state action is no longer a factor of limitation and that Congress has acted through Sec. 1982 to reach private discrimination in housing." (at pp. 44-5)

Reasons for Granting the Writ

1. The decision of the Court below dealt with important questions of federal law, which have never been considered and decided by this Court.

The Court of Appeals manifested its doubt and reluctance to limit Sec. 1982 of Title 42 of the U. S. Code, the Civil Rights Act of 1866, by holding it subject to the Fourteenth Amendment requirement of state action. Its sole comment on the claim that the applicability of Sec. 1982 to private discrimination in the sale of real property was "a novel issue, never before presented to the federal courts" was to note that the issue had been discussed by "Justice (now Judge) Edgerton in dissent in *Hurd* v. *Hodge,* 162 F. 2d 233 at 240-41 "when that case was before the District of Columbia Court of Appeals.[2]" And in that dissenting opinion Judge Edgerton had held the section clearly applicable to any federal court action to enforce compliance with a

2. The Court of Appeals below even went so far as to acknowledge that its reading of the language of *Hurd* v. *Hodge* was contradicted in *United States* v. *Morris,* 125 F. 322 (E.D. Ark. 1903), where Judge Trieber "made the historical distinction between the Thirteenth Amendment, on the one hand, and the Fourteenth and Fifteenth on the other, and observed, p. 324 'Congress is, therefore, authorized by the provisions of the Thirteenth Amendment to legislate against acts of individuals, as well as states, in all matters necessary for the protection of the rights granted by that amendment.'" (379 F.2d 33 at 40).

restrictive covenant. Hence, by implication, at least, the Court of Appeals conceded that the question here presented with respect to the applicability of Sec. 1982 of Title 42 to racial discrimination in housing by a private seller was a novel question, so far as this Court is concerned. But it said that it believed itself bound by the dictum of *Hurd* v. *Hodge,* 334 U. S. 24, even though it also clearly indicated that that dictum ignored the plain language of the statute and its purpose as shown by its legislative history.

The fact that petitioners in that case had raised the issue was noted by this Court in a footnote to its decision in *Hurd* (fn. 4, *supra* at 28). But this Court found it unnecessary to deal with the question in that case because it noted that primary reliance was placed by petitioners in *Hurd* v. *Hodge, supra,* on the contention that such governmental action (judicial enforcement of racial restrictive covenants) on the part of the courts of the District of Columbia was forbidden by the due process clause of the Fifth Amendment (*supra* at 28). Then this Court went on to bar judicial enforcement of racial restrictive covenants because it "denies rights intended by Congress to be protected by the Civil Rights Act" and "consequently, the action cannot stand" (*supra* at 34). But the Court then noted:

> "* * * even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of the supervisory powers over the courts of the District of Columbia. The power of the federal courts to enforce the terms of private agree-

> ments is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where this enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." (at 34-35)

This Court then found that the action taken by the trial court was of such nature that if taken by a state court it would violate the Fourteenth Amendment under *Shelley* v. *Kraemer,* 334 U. S. 1 (1947), and that it would be inconsistent with the public policy of the United States to permit federal courts to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. This Court concluded, "We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action by the courts of the states" (334 U. S. 24 at 35-36). Hence, this Court had no occasion or need to rule in *Hurd* v. *Hodge, supra,* on whether the private action of a would-be seller of real estate in refusing to sell to a would-be Negro purchaser solely because of his race, was in violation of the 1866 Civil Rights Act.

The fact is that *Hurd* v. *Hodge* supports rather than weakens the argument for the constitutional validity of the application of the Civil Rights Act of 1866 to private discrimination in housing. For this Court did say in that decision at 31-32:

> "In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment, for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve."

Apparently the District Court below, and the Court of Appeals read the foregoing as words of limitation. But it is submitted that this was not so intended. Rather, it was intended as showing that, at the very least, the statute in question, now Section 1982 of Title 42, barred governmental action to prevent a sale by a willing white seller to a willing Negro buyer. And the issue raised in the instant case, whether a white seller, refusing to sell to a would-be Negro buyer solely because of the buyer's race, may do so without violating the plain language of the Act and whether there is constitutional authority for federal enforcement of the Act against the white violator, was not dealt with by this Court in any way.

The fact is that the language of the Civil Rights Act of 1866, now Section 1982 of Title 42 of the U. S. Code, becomes unnecessary surplusage if read, as the courts below suggest, as being limited to state action by the Fourteenth Amendment. That section provides simply:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

The purchase, lease, sale, holding and conveyance of real and personal property is normally and almost always a

transaction between two or more private persons and the state's role is limited to providing the mechanical machinery, in the case of transfers of real property, for insuring notice to the world of the transfer. The statute talks in terms of the rights of all citizens to inherit, purchase, lease, etc., real and personal property. Since the state, in most cases, has no direct involvement in such purchase or lease, unless the state is itself either the purchaser or seller or lessor or lessee, the statute would have no impact on the right of individual citizens established by it, if the state, as it normally does, plays no role in the transaction.

Clearly what is and was involved in the Civil Rights Act of 1866, and what Congress intended when it enacted this law, was to prevent any and all sellers of property, real or personal, from continuing in effect one of the incidents of slavery, denial to former slaves of the power to purchase, own or convey and sell such property, to participate in the markets of the time and to invoke the sanctions of the law to effectuate such purchases or sales. This right Congress recognized to be an essential one if the former Negro slaves were to be placed on the same footing as white citizens with respect to participation in the life of the general community. So long as the clear intent and purpose of Congress as embodied in this statute continues to be ignored, so long will our country suffer from the vestiges of Negro slavery; the present strife and violence arising out of the existence of the resultant racial ghettos will continue and expand. And until this Court rules that the statute means what it says and is within the constitutional authority of Congress, our country shall continue to be faced with the evils of con-

tinued racial discrimination in housing, racial ghettos which are festering sores and remnants of Negro slavery.

The argument that a purpose of the 1866 Act was to bar racial discrimination in the purchase of real property as a badge of slavery was upheld in *United States* v. *Morris*, 125 F. 322 (E.D. Ark., 1903) where a lower federal court reached a result directly opposite from that reached by the courts below in the instant case. There the court imposed a duty of non-discrimination on the basis of race on a white lessor of land who sought to discriminate against a Negro in the lease thereof by refusing to comply with the lease. But this ruling was not subjected to review by any appellate court. And thus the major question here involved, the constitutionality of the statute as applied to bar discrimination based on race in the sale of housing between private persons has never been ruled on by this Court.

That the question is a novel one meriting the consideration of this Court is implied by the fact that the Court of Appeals did, in its opinion, suggest that the question was one which should be reviewed by this Court. It specifically stated that it could not rule for petitioners because it, "as an inferior court", could not "give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts" when it was, it said, "faced with a limiting Supreme Court decision" which so far as it has been told directly, "remains good law" (379 F.2d 33 at 43).

2. It is submitted that the effect of the decisions below in this case is unduly to limit the applicability, not only of the Fourteenth Amendment which, in Section 1, is limited

to state action but also of the Thirteenth Amendment which is not and never was so limited. Civil Rights Cases, *supra*, at 22.

It is true that this Court has widened the scope of "state action" in the Fourteenth Amendment. But there is not now and never was any need for this widening to occur with respect to the Thirteenth Amendment and statutes enacted to enforce it, such as the statute here involved, since it was always directed against private, not state, action.

The Civil Rights Act of 1866 was enacted before the adoption of the Fourteenth Amendment. Hence it was adopted under the authority of the Thirteenth Amendment, which makes no reference whatsoever to the states or the duties of a state.[3] In the first case to consider this statute, the United States District Court for the Eastern District of Arkansas held:

> "In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment." *United States* v. *Morris, supra,* at 330.

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3. See, Flack, *The Adoption of the Fourteenth Amendment* (1908, Johns Hopkins Press), pp. 21, 23, 27, for the opinions of the law's sponsors and supporters as to its validity under the powers granted Congress by the Thirteenth Amendment, Sec. 2.

The Court went on to state:

> "That the rights to lease and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable, and a conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)." *United States* v. *Morris, supra,* at 331.

This Court also recognized in the Civil Rights Cases, *supra,* at 22, that the statute in question was enacted under the Thirteenth Amendment, rather than the Fourteenth. The Court stated:

> "Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

In view of the foregoing it would appear that the ruling of the courts below is contrary to long established law. But the fact is that it is also contrary to the spirit and impact of a series of recent decisions in which this Court has so largely broadened the sweep of "state action" as to substantially limit the effect of that doctrine in limiting the

federal power to intervene to protect the essential rights of citizens to be free from interference with federally protected civil rights. See, for example *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); see also *Reitman* v. *Mulkey*, 387 U. S. 369 (1967). Hence, the decision below requires review so that this Court can determine whether it is inconsistent with and contrary to the rulings cited above.

3. Insofar as the decision below fails to take into account the fact that recent decisions of this Court have reflected the view of this Court not only that the Congressional power under Section 5 of the Fourteenth Amendment extends to purely private action which would deny rights guaranteed by that amendment, and, by analogy that Section 2 of the Thirteenth Amendment gives Congress power to enact legislation to implement the rights therein guaranteed by legislation extending to all persons, it should be accepted for review so that it may be reversed.

In *United States* v. *Guest, supra*, six members of this Court, although not speaking for the Court, indicated acceptance of the position that Congress has power under Section 5 of the Fourteenth Amendment, and, therefore, has had, since the adoption of that amendment, power to enact legislation directed against private action interfering with the exercise of rights protected under the amendment. Mr. Justice Stewart, in his opinion for the Court, based his decision on a finding that there was sufficient state action in the defendant's conspiracy to meet the "state action" requirement of the Fourteenth Amendment. He refused

to rule on the question of the impact of Section 5 on Congressional power to adopt legislation against private interference with Fourteenth Amendment rights. Mr. Justice Brennan, concurring in an opinion in which he was joined by Chief Justice Warren and Mr. Justice Douglas, noted that "a majority of the members of the Court express the view today that Section 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy" (86 S. Ct. at 1191). In a footnote, Mr. Justice Brennan explained that his "majority" consisted of the three Justices joining in his opinion plus the three joining in Mr. Justice Clark's opinion, Justices Black and Fortas. These three accepted Mr. Justice Stewart's construction of the indictment as showing state action sufficient to bring about invocation of the Fourteenth Amendment, but also stated their belief that Section 5 empowered Congress to enact laws punishing all conspiracies, with or without state action, that interfere with Fourteenth Amendment rights.[4]

4. See also *Bell* v. *Maryland*, 378 U. S. 226 (1964) where Mr. Justice Goldberg in his concurring opinion, specifically cites the statute in question in this case, as an example of a proper exercise by Congress of the power granted it in Section 5 of the Fourteenth Amendment. At pp. 308-9, he points out that Mr. Justice Bradley's assumption in the Civil Rights Cases that non-discrimination is required in state law, has proven to be altogether wrong, and that his opinion has therefore lost much of its validity. At 309-10 he quotes Mr. Justice Bradley as saying, "Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection * * *" and then goes on to conclude that state conduct which might be described as inaction can nevertheless constitute "state action" under the Fourteenth Amendment where the state fails to protect the constitutional rights of some of its citizens, as Missouri has done here to the petitioners-respondents by not requiring the defendant, as a condition of granting it the benefits listed in the complaint, to sell without racial discrimination.

The Court also upheld the powers of Congress under Section 5 of the Fourteenth Amendment in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), and the exercise of Congressional power under Section 2 of the Fifteenth Amendment, which is equivalent in scope with Section 5 of the Fourteenth Amendment, in *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966).

In the instant case, it is submitted there is sufficient showing of state involvement to meet the "state action" test of the Fourteenth Amendment and, even if Section 1982 were, *arguendo,* subject to the Fourteenth Amendment because of its reenactment in the Civil Rights Act of 1870, it would clearly be a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment to enact legislation directed against conspiracies by private persons, the defendants herein, to deprive petitioners-respondents of their rights under the statute.

But it must also be pointed out that the Thirteenth Amendment has a Section 2 which is almost identical with Section 5 of the Fourteenth Amendment. If the Fourteenth Amendment's Section 5 empowers Congress to take action against private action interfering with or denying rights protected by that amendment, *a fortiori,* the same language in the Thirteenth Amendment empowers Congress to take similar action to bar private action denying rights necessary to implement that amendment. And Section 1982, the Civil Rights Act of 1866, was clearly enacted for that purpose pursuant to Section 2 of the Thirteenth Amendment.

It is clear, therefore, that this Court should now take action, in accordance with the views it expressed in *Guest,*

supra, to accept this case for review, to make it clear that *Guest, supra*, is the law of the land and that Congress had constitutional power under Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth Amendment to enact legislation such as Section 1982 of Title 42 directed, as it is, on its face, against private action to deny rights under both those amendments.

4. Assuming, *arguendo*, that Section 1982 of Title 42 of the U. S. Code, is not applicable to the instant case, there is nevertheless sufficient "state action" alleged in the complaint here under consideration to require review by this Court to establish that the discriminatory action of the respondents herein is a violation of Fourteenth Amendment rights cognizable by federal courts.

The Court of Appeals below devoted a whole section of its opinion to the expansion of the "state action" concept (379 F.2d 33 at 40). It noted that "State action has also been found in any significant participation or involvement in property." And elsewhere on the same page it said, "we think we may safely observe, without belaboring the cases, that the Supreme Court and other courts in general have broadly viewed the concept of state action. Indeed, by this breadth of view they have ruled against and struck down discriminatory housing practices in a number of instances." Yet, apparently because it viewed the basic issue of the case as being whether Section 1982 reaches discrimination in private subdivision housing (*supra* at 42-3) it failed to examine whether the trial court had ruled correctly when it found that the multiple involvement with and use of state facilities by the respondents in building and selling the subdivision did not involve sufficient state action to call into operation the limitation of the Four-

teenth Amendment against denial of equal protection of the laws. The Court of Appeals did concede (*supra* at 46) in the last sentence of its opinion that "The views entertained by Mr. Justice Douglas, of course, would require the opposing result." At the same time the Court of Appeals spoke as if the sole elements of state power involved in the discriminatory action of the respondents were their being chartered by the state as corporations and their being licensed as real estate brokers. But the complaint, the validity of which is here under consideration, spells out a whole long list of aspects of state power involved in the activities of respondents. These include their use of practitioners of other state licensed businesses, plumbers, electricians, lending institutions, etc. and the use of a state-approved plan and a sales plan under which respondents advertised their houses with a public utility, and authorized government monopoly (R. pp. 5-6), which in all other of its operations would be barred from participating in a racially discriminating scheme. *Boman* v. *Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

This Court held in *Marsh* v. *Alabama, supra,* that a company-owned town was subject to the Fourteenth Amendment requirements in the same way that any other town was, and that the owning corporation's property interests did not settle the question. Clearly there comes a point when the alleged rights of a land-owner give way to the reality that in fact he has been constituted a local government, complete with the governmental power to zone. The point is clearly reached in this case. If after completion of Paddock Woods, the Trustees voted to allow no Negroes in the subdivision, the Court would have no trouble holding such a regulation invalid, in the same way that it has held invalid ordinances attempting to set residential zoning pat-

terns. *Buchanan* v. *Warley,* 245 U. S. 60 (1917). How then can respondents, who presently exercise the municipal governmental power in Paddock Woods, be permitted with impunity to exercise powers granted by the state through its inaction as well as action to bar entry of Negroes into the community?

There is another way of characterizing the involvement of the State of Missouri with the activities of respondents which this Court has in recent decisions recognized as an indication of "state action". One must inquire not only what the state is doing for respondents, but also what respondents are doing for the state. For what respondents here are doing for the state is acting in lieu of a local government.

Housing is not the only subject where this Court has found delegation of state functions to be "state action". This Court has held in the election primary cases culminating in *Terry* v. *Adams,* 345 U. S. 461 (1953), that when private citizens are permitted to exercise state governmental functions, they are subject to all constitutional requirements imposed on the states. In fact, in *Terry* v. *Adams, supra,* it was held that the "Jaybird" party, which had no official state recognition whatsoever, and which merely elected a candidate who then appeared on the Democratic primary ballot, could not refuse to allow Negroes to participate in their pre-primary voting, solely because it was performing a governmental function.

Respondents in this case are performing the governmental function of operating a municipality, and they receive the full cooperation and assistance of the State of

Missouri and its political subdivisions and agencies in doing so. To argue that this is mere state inaction is to ignore reality. The fact is that there is state action as well as inaction. It is no accident that state authorities have split off St. Louis County from the City of St. Louis and further split the county into 96 municipalities leaving most of the valuable residentially zoned areas in unincorporated sections where they may be "developed" by companies such as respondents on the basis of excluding Negroes. To say that respondents' acts are merely private acts is to "ignore", as the state claims it is doing, the entire pattern in St. Louis for maintaining and indurating segregation which is based on government cooperation in discrimination with "private" subdevelopers, who as Mr. Justice Douglas points out in *Reitman* v. *Mulkey, supra,* then use the state power to impose patterns of racial discrimination, a misuse of the state's zoning function. A state may not constitutionally permit such developers to act in a way the state itself could not, to impose private racially discriminatory patterns of racial zoning.

If the framers of the Fourteenth Amendment had intended to limit the non-discriminatory action prohibited to states and their agencies and subdivisions by positive discriminatory laws, they would have provided only:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. * * *"

Instead of this the drafters went on to provide:

> "nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If, for example, a policeman stands idly by while a Negro child is beaten while trying to exercise his Fourteenth Amendment right to attend an integrated school, it is clear he has deprived the child of equal protection just as much as if he himself had beaten the child. It is submitted that the decisions of the courts below in this case allow the State of Missouri to deny equal protection to petitioners, aside from all the positive assistance it is giving respondents, merely by putting respondents in the position to bar the Joneses from buying a home they can afford with white neighbors, thus forcing them into segregated housing, and then refusing to do anything about it.

This Court has recognized that a state may act in violation of the Fourteenth Amendment prohibition against racial discrimination by legislative action (*Buchanan* v. *Warley, supra*), by executive action (*Lombard* v. *Louisiana, supra*), by judicial action (*Shelley* v. *Kraemer, supra*, and *Hurd* v. *Hodge, supra*), by action of its school board (*Brown* v. *Board of Education*, 347 U. S. 483 (1954)) or by its inaction in permitting its lessee to discriminate.[5]

5. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961) where the court stated, at 725, 726:

> "As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction. [Citations omitted.] By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has

Under the lower court's holding in this case, the developer of a community which may well ultimately hold 2,700 families can bar Negroes, when under *Shelley* v. *Kraemer, supra,* a few individual homeowners could not do so. The lower court here holds respondent subdivision developers' action is "private" action. This holding contrasts oddly with *Shelley* v. *Kraemer, supra,* where the same effort made by a few individuals was "state action" simply because they sought to use a court in an attempt to enforce the discrimination.

An important question of interpretation of the rule of "state action", if it still exists, has thus been raised for the first time in this case. Petitioners contend that the Court of Appeals erred in refusing to recognize the existence of state action in the numerous positive acts of state assistance alleged, in the delegating of municipal functions to respondents, and in the combination of these two factors

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so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.

"Because readily applicable formulae may not be fashioned * * * a multitude of relationships might appear to some to fall within the Amendment's embrace, but that * * * can be determined only in the framework of the peculiar facts or circumstances present * * *"

See also *United States* v. *Guest, supra* at 755-6 where Mr. Justice Stewart stated:

"This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."

to deny constitutionally protected rights. Because of the importance of this question, this Court should review its decision.

5. The legal and constitutional questions involved in this case are of such great importance as to call for final resolution by this Court.

That "housing is a necessary of life" is a truism that Mr. Justice Holmes acknowledged in *Block* v. *Hirsch*, 256 U. S. 135 (1921) at 156. The state has always been concerned and deeply involved in the ownership and alienability of real property. This is reflected in the fact that the government regulates land transfers through recordation, through a specific real property law, and that as long ago as the seventeenth century the Rule Against Perpetuities took final form (see Powell, Richard R., *The Relationship Between Property Rights and Civil Rights*, 15 Hastings Law Journal 140 (1963)). As recently as 1923 the Court took notice of the fact that ownership of real property may carry with it an attribution of the sovereignty of the state. Thus, in *Terrace* v. *Thompson*, 263 U. S. 197 (1923), this Court, upholding California's Alien Land Law—happily since repealed—cited as a basis for so holding, the fact that the state might be endangered if it allowed persons ineligible to become citizens to own land because it was "within the realm of possibility that every foot of land might pass to the ownership or possession of non-citizens" (*supra*, at 224), and thus endanger the authority of the state.

Another special governmental impact of land ownership flows from the fact that allocation of representation in local and national legislative bodies is related to geographical

districts. Hence the creation and perpetuation of patterns of racial exclusion by means of "private" residential racial segregation by sub-developers as is here involved carries with it, as a concomitant, a necessary impact on the racial composition of the population of legislative districts. And this, in turn, can lead to a distrust by segregated racial minorities of our present democratic system which endangers constitutional guarantees of our freedom and equality of treatment under law. We have in recent years seen the fruit of racial segregation in housing, riots in the racial ghettos of many of our major cities, and the essential repudiation of democracy implicit in the pronouncements and behavior of many of the proclaimers of "black power" and their counterparts, the defenders of the segregated *status quo,* the "white power" advocates of race hatred.

The extent of racial discrimination in housing in the United States has been described in detail by the United States Commission on Civil Rights which stated in 1961:

> "In 1959 the Commission found that 'housing . . . seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay.' Today, 2 years later, the situation is not noticeably better.
>
> "Throughout the country large groups of American citizens—mainly Negroes, but other minorities too—are denied an equal opportunity to choose where they will live. Much of the housing market is closed to them for reasons unrelated to their personal worth or ability to pay. New housing, by and large, is available only to whites. And in the restricted market that is open to them, Negroes generally must pay more for equivalent housing than do the favored majority.

> 'The dollar in a dark hand' does not 'have the same purchasing power as a dollar in a white hand.' "[6]

The Commission described the patterns of racial segregation at length and decried the "white noose" surrounding the Negro ghettos in all our major cities. (Report of U. S. Commission on Civil Rights, Part 4, *Housing* (1961), pp. 366-377).

The economic effects of racial segregation in housing are many and harmful to the entire community. Davis McEntire, in his pathfinding study, *Residence and Race* (1960) says at p. 155:

> "Racial differences in the relation of housing equality and space to rent or value can be briefly summarized. As of 1950, non-white households, both renters and owners, obtained a poorer quality of housing than did whites at all levels of rent or value, in all regions of the country. Non-white homeowners had better quality dwellings than renters and approached more closely to the white standard, but a significant differential persisted, nevertheless, in most metropolitan areas and value classes * * *"[7]

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6. Report of the U. S. Commission on Civil Rights, Part 4, *Housing* (1961) at p. 1. See also Report of the President's Committee on Civil Rights, *To Secure These Rights* (1947), pp. 67-70; Myrdal, Gunnar, *An American Dilemma* (1944), pp. 618-27; Commission on Race and Housing, *Where Shall We Live?* (1958), pp. 1-10; Report of the United States Commission on Civil Rights (1959), pp. 336-375; Weaver, *The Negro Ghetto* (1948); Abrams, *Forbidden Neighbors* (1955), pp. 70-81, 137-49, 150-190, 227-243; McEntire, Davis, *Residence and Race* (1960).

7. See also, Commission on Race and Housing, *Where Shall We Live?* (1958), p. 36.

The all-pervasive evil effects of racial discrimination in housing were summarized by the President of the Protestant Council of New York as follows:

> "All of our community institutions reflect the pattern of housing. It is indescribable, the amount of frustration and bitterness, sometimes carefully shielded, but the anger and resentment in these areas can scarcely be overestimated and can hardly be described; and this kind of bitterness is bound to seep, as it has already seeped, but increasingly, into our whole body politic * * * I can think of nothing that is more dangerous to the nation's health, moral health as well as physical health, than the matter of these ghettos."[8]

Since this case arose in the St. Louis area, we cite for the Court, as an example of what is true throughout the country, statistics showing how "private" racial exclusion in segregation and housing have affected the economic status of the Negro residents excluded from access to housing in St. Louis suburbs and confined to ghettos in the City of St. Louis. From 1950 to 1960, the non-white population of St. Louis increased by 62,000 while its white population decreased by 214,377. At the present time Negroes constitute 36% of the population of the City of St. Louis and only 2.7% of adjoining St. Louis County in which Paddock Woods is located. One important effect of this pattern of racial concentration and exclusion is that 22% of the families in the City earn less than $3,000 per year as compared with only 7% in this category in the County. (City of St. Louis, Application to the Department of Housing and Urban Development for a Grant to Plan a Comprehensive

8. U. S. Commission on Civil Rights, 1959 Report, p. 391. See also Report, *supra*, note 6, pp. 380, 386 *et seq.*, Clark, *Prejudce and Your Child* (1955), pp. 39-40.

City Demonstration Proposal, April 26, 1967, p. 7.) The effect of this pattern on the welfare programs of City and County is too apparent to require comment. But the impact of such "private" racial segregation in housing on employment is illustrated by the fact that between 1954 and 1964, the City of St. Louis lost 9,500 jobs, while St. Louis County gained 47,600 jobs. (See, City of St. Louis, Application, *supra.*)

Especially important, in view of this Court's opinion in *Brown* v. *Board of Education, supra,* are the effects which this segregation in housing has upon schools and children.

The Missouri Commission on Human Rights reported in 1961 that no significant advance had occurred in desegregating Missouri's public schools. (Report of U. S. Commission on Civil Rights, *50 States Report,* p. 357.) It recommended:

> "That immediate steps be taken to free housing from racial and religious restrictions, thereby eliminating racial ghettos, which perpetuate racial segregation in the schools in spite of sincere efforts of boards of education to put an end to such segregation." (at 358)

The United States Commission on Civil Rights reported in 1967 that segregation in public schools has increased over the last 15 years, particularly in northern cities. (Report of U. S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967), at 8, 199.)

The racial isolation between city and suburb, made possible by state governmental boundaries and the delegation

of housing functions to private developers, which is the subject matter of this action, is described by the Commission, which concludes:

> "The organization of school districts would not be of special significance if the racial and socio-economic groups they served were fairly representative of the entire metropolitan area. But city and suburban school districts generally serve separate economic, social, and racial groups." (Idem at 200.)

The Commission stated also,

> "In large part, the separation of racial and economic groups between cities and suburbs is attributable to housing policies and practices." (Idem at 20-25.)

going on to describe the means by which segregation is carried out by tacit cooperation of private industry, local government and Federal government.

This full report of the Commission goes on to outline the total failure of compensatory education plans in trying to make "separate" education equal, and the startling evidence that desegregation itself has a profound beneficial effect on the general performance of students (idem at 120-140), concluding among other things that the finding of this Court that segregation "affects the hearts and minds of children in ways unlikely ever to be undone" applies to segregation compelled by housing discrimination as well as to that segregation compelled only by mandatory school segregation laws (idem at 193). Its conclusions (idem at 193) and findings (idem at 199) are very much at the heart of the public policy involved in this case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory and Constitutional Provisions Quoted:

Civil Rights Act of 1866

Act of April 9, 1866. 14 Stat. 27.

—An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different pun-

ishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the

manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

SEC. 4. *And be it further enacted,* That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute

proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

SEC. 5. *And be it further enacted,* That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars,

to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

SEC. 6. *And be it further enacted,* That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of

the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offenses, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

SEC. 7. *And be it further enacted,* That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioner for the arrest of offenders against the provisions of this act shall be entitled

to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

SEC. 8. *And be it further enacted*, That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

Appendix A

SEC. 9. *And be it further enacted,* That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

SEC. 10. *And be it further enacted,* That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

Appendix A

Civil Rights Act of 1870

• • •

SEC. 18. *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

• • •

Appendix A

Civil Rights Act of 1871

Act of April 20, 1871. 17 Stat. 13.

—An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

• • •

SEC. 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offences heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

Appendix A

42 U.S.C. Section 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Appendix A

42 U.S.C. Section 1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Appendix A

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Appendix A

The Constitution

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B

Opinion and Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,473

Joseph Lee Jones and Barbara Jo Jones,

Appellants,

v.

Alfred H. Mayer Company, a Corporation, Alfred Realty Company, a Corporation, Paddock Country Club, Inc., a Corporation, Alfred H. Mayer, an Individual and an Officer of the Above Corporations,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

[June 26, 1967.]

Before BLACKMUN, MEHAFFY and LAY, Circuit Judges.

BLACKMUN, Circuit Judge.

This case comes close to raising nakedly the question whether, in the absence of federal and state open housing legislation, an owner of a home, which is on the market for sale, may refuse to sell that home to a willing purchaser merely because that purchaser is a Negro. The

district court has phrased the sensitive issue, in the case's factual context, as follows:

> "[T]he issue is whether the willful refusal of an owner of private property who is developing a private subdivision thereon to sell a part of his property to a Negro solely because of race entitles the person so discriminated against, under any presently applicable federal law, either to damages or to a mandatory injunction or both."

The case is here by way of an appeal by the plaintiffs from the dismissal of their complaint for failure to state a cause of action. Judge Regan's comprehensive memorandum is reported as *Jones* v. *Alfred H. Mayer Co.*, 255 F.Supp. 115 (E.D. Mo. 1966). We are favored with helpful briefs by the parties and by the National Committee Against Discrimination in Housing which, as amicus curiae, urges reversal particularly in the light of the Civil Rights Act of 1866 and its present codification as 42 U.S.C. §1982. Jurisdiction is established under 28 U.S.C. §1343(3) and (4).

A. *The Facts.* Because the motion to dismiss was granted, the facts, so far as this appeal is concerned, are those well pleaded in the complaint. *Cooper* v. *Pate*, 378 U.S. 546 (1964); *Jenson* v. *Olson*, 353 F.2d 825, 828 (8 Cir. 1965); *Bonnot* v. *Congress of Independent Unions*, 331 F.2d 355 (8 Cir. 1964); *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 662-63 (8 Cir. 1962).

The plaintiffs, Joseph Lee Jones and Barbara Jo Jones, are husband and wife. Joseph Lee Jones is a Negro. Both are federal employees and Missouri citizens. The defend-

ants, four in number, are Alfred H. Mayer Company, a corporation engaged in the business of developing subdivisions in Saint Louis County, Missouri, and of constructing homes to be sold to the public; Alfred Realty Co., a Missouri licensed[1] corporate real estate broker acting as the exclusive sales agent for Mayer houses; Alfred H. Mayer who owns the controlling interest in both corporations, who is their managing officer, and who also is licensed by Missouri as a real estate salesman; and Paddock Country Club, Inc., a corporation controlled by the other defendants "for the primary use and benefit of the people in" Paddock Woods, a subdivision which the defendants are presently developing.

In June 1965 plaintiffs were looking for a new home and, in consequence of an advertisement in the St. Louis Post-Dispatch, went to Paddock Woods, picked up a brochure describing the development there, and inspected display homes on the site. They determined that a certain style of house suited their needs and resources and was reasonably accessible to their places of employment. According to the defendants' promotional material this house could be built and sold for $28,195. The plaintiffs selected a lot as their first choice among those available in the subdivision. The defendants, through their agents, "refused to consider Plaintiffs' application to purchase a house and to enter into a contract for the sale of a house and lot, because Joseph Lee Jones is a Negro, and it is Defendants' general policy not to sell said houses and lots to Negroes".

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1. Presumably pursuant to V.A.M.S., ch. 339, and particularly §§339.020 and .030.

Appendix B

The complaint also recites: Paddock Woods includes more than 100 projected homes, with more plots to be opened. The ultimate result will be a suburban community of about a thousand people "living in an area chosen by Defendants for development, residing in homes designed and built by Defendants, driving on streets built by Defendants, playing golf on the nearby eighteen (18) hole course built by Defendants for the convenience of residents of [this and other nearby subdivisions developed by Defendants], and enjoying the facilities of the nearby bath and tennis club which Defendants plan to open * * * for the exclusive use of residents of Paddock Woods".

The complaint further alleges state and municipal involvement by the Missouri incorporation of the three corporate defendants; the protection afforded the defendants "by various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property"; the approval of plans by the county building commissioner; the furnishing of sewer service by the metropolitan district; the responsibility of the planning commission for zoning; the county recording of transfers and restrictions; the availability of the traffic and highway departments and the county engineer; the education of children in a tax supported school district; and the furnishing of electric and gas services by state licensed utilities. It is also alleged that Paddock Woods is "enlarged" by the defendants' other nearby developments "all of which are financed by loans insured by the Federal Housing Administration".

Appendix B

There is no allegation of federal or state monetary assistance in the development of the Paddock Woods subdivision. The amicus brief states flatly that "it is conceded for this appeal that defendants have not accepted any form of direct state or federal aid or financing which might have subjected them to federal statutes or executive orders or constitutional provisions which bar recipients from engaging in discrimination based on race in using the benefits of such aid in their project".

The prayer asks for $50 ordinary damages, $10,000 punitive damages, and injunctive relief.

It is against these facts that the defendants' motion to dismiss was filed.

B. *The Grounds Asserted.* The complaint alleges violation of rights under the Civil Rights Acts of 1866, 1870 and 1871, from which 42 U.S.C. §§1982, 1981, and 1983, are respectively derived; under §§201 to 207 of the Civil Rights Act of 1964, 42 U.S.C. §2000a to 2000a-6, relating to public accommodations; under Executive Order No. 11063, entitled "Equal Opportunity in Housing", 27 F.R. 11527 (1962); under the Thirteenth and Fourteenth Amendments; and under the enabling clause of Article I, §8, and the supremacy clause of Article VI of the Constitution. The 1964 Act and the Executive Order, however, are not urged on the appeal.[2]

2. The Public Accommodations Subchapter of the 1964 Act relates to "any place of public accommodation" as therein defined, that is, to hotels, restaurants, theatres, and the like. The Executive Order, Section 101, concerns functions of the executive branch of the federal government which "relate to the provision, rehabilitation, or operation of housing and related facilities". It seems obvious that neither has direct application here.

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The plaintiffs argue that the complaint states facts which constitute a violation of rights, guaranteed to them by §1982, to purchase property without discrimination; (2) that §1982 is valid and applicable whether or not "state action" is involved; and (3) that, in any event, the discrimination suffered by the plaintiffs results from state action. The amicus argues similarly, stresses that §1982 is applicable here without regard to the presence of any indicia of state action, and relies particularly on the legislative history. It urges that there is an "imperative need for speedy federal action to help break down the walls of housing prejudice"; that the use of federal and state power "cannot wait for a reluctant Congress"; that "Builders of white suburban communities must not be allowed to spread the plague of housing segregation"; and that "since 1866 there has been federal legislation which bars racial discrimination in the sale or lease of real property". The amicus views the issue of the applicability here of §1982 as "a novel issue, never before presented to the federal courts".[3]

The appeal, thus, pivots primarily on §1982.

The defendants, in response, claim that the plaintiffs, in order to make a case under the section, must show that state action is present and that the facts alleged do not constitute conduct involving state action.

C. *The Statutes.* These read:

"§1982. Property rights of citizens

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed

3. See, however, Justice (now Judge) Edgerton in dissent in *Hurd* v. *Hodge*, 162 F.2d 233, 235, 240-41 (D.C. Cir. 1947).

by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

"§1981. Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"§1983. Civil Action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

D. *The Chronology.* The history of §1982, of the companion §§1981 and 1983, and of the Thirteenth and Fourteenth Amendments, is not without interest and significance and we examine it.

1. The Thirteenth Amendment ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to

their jurisdiction", plus an enabling section) was certified by the Secretary of State on December 18, 1865. 13 Stat. 774.

2. The first of the civil rights statutes was the Act of April 9, 1866, ch. 31, 14 Stat. 27.[4] It is evident from its language that this statute is the precursor of both the present §1982 and §1981. It has been recognized that the Act, which was passed over the first President Johnson's veto within four months after the Thirteenth Amendment became effective, came about "by virtue of this amendment". *United States* v. *Harris,* 106 U. S. 629, 640 (1882); Civil Rights Cases, 109 U. S. 3, 22 (1883); *United States* v. *Morris,* 125 F. 322, 323 (E.D. Ark. 1903).

3. The Fourteenth Amendment (citizenship; privileges and immunities; due process; equal protection; other provisions; and an enabling section) passed the United States Senate on June 8, 1866, and the House on June 13 of that year, and thus was proposed on the latter date. Cong.

4. *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

Globe, 39th Cong., 1 Sess., 3042, 3148-49. It was certified finally by the Secretary of State on July 28, 1868.

It is thus at once apparent that the 1866 statute was enacted prior to the formal proposal of the Fourteenth Amendment. This fact has been judicially noted. *United States* v. *Price,* 383 U. S. 787, 804 (1966); *Hurd* v. *Hodge,* 334 U. S. 24, 32 (1948); *Oyama* v. *California,* 332 U. S. 633, 640 (1948); Civil Rights Cases, supra, p. 22 of 109 U. S.; *County of San Mateo* v. *Southern Pac. R.R.,* 13 F. 145, 149 (C.C.D. Cal. 1882, Mr. Justice Field); Slaughter-House Cases, 83 U. S. (16 Wall.) 36, 83, 91 (1872), Mr. Justice Field dissenting.

4. The second civil rights statute was the Enforcement Act of May 31, 1870, ch. 114. Section 16 of that Act, 16 Stat. 144, did not include the words "to inherit, purchase, lease, sell, hold, and convey real and personal property", which were in the 1866 statute, but otherwise did contain, with minor exceptions immaterial here, the earlier Act's language now found in §1981. The Supreme Court has characterized §16 as "patterned after §1 of the Civil Rights Act of 1866". *Hurd* v. *Hodge,* supra, p. 31 of 334 U. S., footnote 7. Moreover, §18 of the 1870 Act provided flatly that the 1866 Act "is hereby re-enacted". The resulting codification effect, therefore, appears to have been the separation of the property right guaranties for non-white citizens from the more generally stated equality provisions.

It has been noted that there were doubts in some quarters as to the constitutional validity of the 1866 Act; that

the first section of the Fourteenth Amendment had as one of its purposes the elimination of such doubts; and that those doubts were removed by the amendment. *Hurd* v. *Hodge,* supra, pp. 32-33 of 334 U. S., and Mr. Justice Field dissenting in the Slaughter-House Cases, supra, pp. 93 and 97 of 83 U. S. (16 Wall.), and in Ex Parte Virginia, 100 U. S. 339, 349, 364-65 (1879), and partially concurring in *Virginia* v. *Rives,* 100 U. S. 313, 324, 333 (1879).

5. Section 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13, was a forerunner of what is now §1983. It provided liability and redress for certain deprivations of civil rights. It referred specifically to the 1866 Act. Its title was "An Act to enforce the Provisions of the Fourteenth Amendment. * * *" The Supreme Court has described the Act as "one of the means whereby Congress exercised the power vested in it by §5 of the Fourteenth Amendment to enforce the provisions of that Amendment". *Monroe* v. *Pape,* 365 U. S. 167, 171 (1961).

6. The next pertinent and, until 1957, the last civil rights act was that of March 1, 1875, ch. 114, 18 Stat. 335. Its first two sections were declared unconstitutional in the Civil Rights Cases, supra. 109 U. S. 3 (1883).

From this chronology one sees, in summary, that the 1866 Act followed immediately upon the Thirteenth Amendment; that it became law before the Fourteenth Amendment was proposed by Congress; that the Fourteenth Amendment was directed to situations not reached by the Thirteenth or by the 1866 Act, or, at least, only

questionably covered by them; that, seemingly, the 1870 and 1871 Acts were an implementation of the Fourteenth Amendment; and that the 1866 statute was reenacted as part of the 1870 Act.

E. *The Fourteenth Amendment's §1 and state action.* There is no question that §1 and its guaranties of privileges and immunities and equal protection are directed at and prohibitive of "state action". The language, "No State shall" and "nor shall any State deprive", is indicative and clear. It would seem to follow that enabling legislation, to the extent it is enacted in enforcement of the Amendment's first section is so to be directed and is so limited. It was on an approach of this kind that the first two sections of the 1875 Act, relating to equal enjoyment of places of public accommodation were held unconstitutional in 1883:

> "The first section of the Fourteenth Amendment * * * is prohibitory in its character, and prohibitory upon the States. * * * It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. * * * [U]ntil some State law has been passed, or some State action through its officers or agents has been taken * * * no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity. * * * The wrongful act of an individual, unsupported by any [State] authority, is simply a private wrong, or a crime of that individual." Civil Rights Cases, supra, pp. 10, 11, 13 and 17 of 109 U. S.

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Significant state action has been the consistent measuring stick under §1 of the Fourteenth Amendment. *Virginia* v. *Rives*, supra, p. 333 of 100 U.S.; *United States* v. *Harris*, supra, pp. 638-39 of 106 U.S.; *Corrigan* v. *Buckley*, 271 U.S. 323, 330 (1926); *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948); *Hurd* v. *Hodge*, supra, p. 31 of 334 U.S.; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 721-22 (1961); *United States* v. *Guest*, 383 U.S. 745, 754-56 (1966); *United States* v. *Price*, supra, p. 799 of 383 U.S.; *Reitman* v. *Mulkey*, —— U.S. —— (1967).

F. *State action and §1982.* Despite the facts of chronological priority of the Act of 1866 over the Fourteenth Amendment and the derivation of §1982 from the 1866 Act, is this section nevertheless infected today with any limitation of scope and application attendant upon the Amendment's first section and federal legislation which enforces it?

There are definite indications in Supreme Court opinions that the 1866 Act and §1982 are subject to the limitations of the Amendment's first section and are not now to be regarded as direct legislation implementing, instead, the Thirteenth Amendment. In *Virginia* v. *Rives*, supra, p. 333 of 100 U.S., Mr. Justice Field said, "After [the Fourteenth Amendment's] adoption the Civil Rights Act was re-enacted, and upon the first section of that amendment it rests". In *Ex Parte Virginia*, supra, p. 345 of 100 U.S., the Court said, "They [the Thirteenth and Fourteenth Amendments] were intended to be, what they really are, limitations of the power of the States". The Court in the

Civil Rights Cases, supra, p. 16 of 109 U.S., discussed the 1866 Act and its enactment. It referred to the penal portion of the statute and its reference to state law. Although noting, p. 20, that the Thirteenth Amendment was self-executing and authorized enforcement legislation "primary and direct in its character", it observed that the Amendment was concerned with slavery. The Court said, pp. 22-24, that in 1866,

> "Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship. * * * [T]he province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States * * * The amendments are different, and the powers of Congress under them are different. * * * The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes."

The public accommodations legislation then under challenge was held authorized by neither the Thirteenth nor the Fourteenth Amendments. The first Mr. Justice Harlan alone dissented. See *Buchanan* v. *Warley*, 245 U.S. 60, 78-79 (1917).

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In *Corrigan* v. *Buckley,* supra, it was said, pp. 330-31 of 271 U.S.,

> "The Thirteenth Amendment denouncing slavery and involuntary servitude * * * does not in other matters protect the individual rights of persons of the Negro race. * * * [T]hey [§§1981, 1982, and 1983], like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

Of particular significance is *Hurd* v. *Hodge,* supra, a case concerning restrictive clauses in private conveyances. Mr. Chief Justice Vinson, in speaking for five of the six Justices who passed on the case, directly related the 1866 Act to the Fourteenth Amendment and spoke of the "close relationship" between the two, "for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve". Both the statute and the joint resolution "were passed in the first session of the Thirty-Ninth Congress. * * * It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy". Pp. 33 and 32 of 334 U. S. This is rather positive language.

There are seemingly contrary implications in *United States* v. *Morris,* supra, 125 F. 322 (E.D. Ark. 1903), where Judge Trieber made the historical distinction between the Thirteenth Amendment, on the one hand, and the Fourteenth and Fifteenth on the other, and observed, p. 324,

"Congress is, therefore, authorized by the provisions of the thirteenth amendment to legislate against acts of individuals, as well as of the states, in all matters necessary for the protection of the rights granted by that amendment". Of like import, perhaps, are the comments of Judge Edgerton, in dissent, in *Hurd* v. *Hodge,* 162 F.2d 233, 235, 240-41 (D. C. Cir. 1947).

G. *The expansion of the state action concept.* Although to this date the state action limitation has continued thus to be engrafted upon enabling legislation under the first section of the Fourteenth Amendment, and although we have these indications from the Supreme Court that the limitation applies to the 1866 Act and, consequently, to §1982, we think we may safely observe, without belaboring the cases, that the Supreme Court and other courts in general have broadly viewed the concept of state action. Indeed, by this breadth of view they have ruled against and struck down discriminatory housing practices in a number of instances.

Shelley v. *Kraemer,* supra, 334 U. S. 1 (1948), is a leading example. There the Court held that state court enforcement of a private race discrimination agreement amounted to state action. The case involved an attempt to enforce such a restrictive covenant and thereby to void a sale by a willing white seller to a willing negro purchaser. Thus, the right to acquire property, which was "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment", was interfered with, even though "the restrictive

agreements, standing alone, cannot be regarded as violative'' of Fourteenth Amendment rights. The companion case of *Hurd* v. *Hodge,* supra, 334 U. S. 24 (1948), concerned a similar restrictive covenant in the District of Columbia. The Court found it unnecessary to resolve the Fifth Amendment issue advanced but held that §1982 prohibited judicial enforcement of the restrictive covenant. An alternative ground for the decision was national public policy which does not permit the federal court to do in the District what a state court may not do under the Fourteenth Amendment and the holding in *Shelley* v. *Kraemer.* Later *Barrow* v. *Jackson,* 346 U. S. 249 (1953), complemented *Shelley* by denying damages for breach of a racially restrictive covenant.

State action has also been found in any significant participation or involvement in property. *Burton* v. *Wilmington Parking Authority,* supra, 365 U. S. 715 (1961) (privately owned restaurant in a building owned and operated by a state agency for public purposes); *Derrington* v. *Plummer,* 240 F.2d 922 (5 Cir. 1956), cert. denied 353 U. S. 924 (cafeteria in a county courthouse); *Buchanan* v. *Warley,* supra, 245 U. S. 60 (1917) (racial zoning laws); *Pennsylvania* v. *Board of Directors,* 353 U. S. 230 (board, appointed under a statute, of a school funded by a will); *Evans* v. *Newton,* 382 U. S. 296 (1966) (city supervision of a park); *Banks* v. *Housing Authority,* 260 P.2d 668 (Cal. Dist. Ct. App. 1953) (public housing development); *Smith* v. *Holiday Inns of America, Inc.,* 336 F.2d 630 (6 Cir. 1964) (motel on land purchased from housing authority in redevelopment project promoted with public

funds); *Ming* v. *Horgan*, 3 Race Rel. L. Rep. 693 (Cal. Super. Ct. 1958) (FHA and VA insured subdivisions). See *Robinson* v. *Florida*, 378 U. S. 153 (1964); *Anderson* v. *Martin*, 375 U. S. 399 (1964); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); *Peterson* v. *Greenville*, 373 U. S. 244 (1963); *McCabe* v. *Atchison, T. & S.F. Ry.*, 235 U. S. 151 (1914); *Boman* v. *Birmingham Transit Co.*, 280 F.2d 531 (5 Cir. 1960); 3 ALR 2d 466; 14 ALR 2d 153.

There are instances in this area where courts have refused to find state action and have denied the requested relief. *Barnes* v. *City of Gadsden*, 174 F. Supp. 64 (N.D. Ala. 1958), aff'd 268 F.2d 593 (5 Cir. 1959), cert. denied 361 U.S. 915 (city housing authority carrying out a slum clearance program); *Dorsey* v. *Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied 339 U. S. 981 (low cost housing corporation organized under state redevelopment law); *Johnson* v. *Levitt & Sons*, 131 F.Supp. 114 (E.D. Pa. 1955) (subdivision developer with mortgages guaranteed by FHA and VA); *Hackley* v. *Art Builders, Inc.*, 179 F.Supp. 851 (D. Md. 1960) (housing project).

H. *The possible incipient emergence from the shackles of the state action limitation.* Over and beyond this generally broad and seemingly expanding approach to the concept of state action are certain indications in recent Supreme Court opinions that state action is shrinking as a factor of deterrent influence in the area of discrimination. The new attitude seems to focus on other provisions of the Constitution or generously on the enabling §5 of the Fourteenth Amendment and congressional action there-

under, rather than on the narrow state-confined feature of the amendment's first section.

Perhaps the first intimation of this is in the companion cases of *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964), and *Katzenbach* v. *McClung*, 379 U. S. 294 (1964), where the Court, through the commerce clause, struck down discriminatory practices. The Court there upheld certain portions of the public accommodations title of the Civil Rights Act of 1964, 78 Stat. 241, 243. Section 201 of the Act, 42 U.S.C. §2000a, prohibits discrimination in any place of public accommodation and defines as such a place each of a number of described enterprises "if its operations affect commerce, or if discrimination or segregation by it is supported by State action". As noted, the Court relied on the commerce clause and refrained from passing on the issue of state action. Mr. Justice Douglas, in concurrence, p. 279, was reluctant to rest solely on the commerce clause. He preferred to rest on the Fourteenth Amendment's enabling §5 and expressed the thought that discrimination enforced by officials of a state or political subdivision thereof is state action. Mr. Justice Goldberg, in concurrence, p. 291, also relied on the Fourteenth Amendment's §5 as well as the commerce clause.

Mr. Justice Clark, in the primary opinion in *Heart of Atlanta* made specific reference, pp. 250-52, to the Civil Rights Cases and stated that that decision was without precedential value because the public accommodations provisions of the 1875 Act were not limited to businesses impinging on interstate commerce; because a business which in 1875 was not within the ambit of the commerce

power was not necessarily outside it today; and because the government in the Civil Rights Cases had not relied on the commerce power and there is language in the opinion which indicates the Court "did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power".

Of greater significance are the several opinions in *United States* v. *Guest,* supra, 383 U. S. 745 (1966). That case concerned an indictment for criminal conspiracy, in violation of 18 U.S.C. §241 ("to injure * * * any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States"), to interfere with the free enjoyment by Negroes of state owned facilities and with their right to travel freely over interstate highways in Georgia. In its primary opinion the Court again acknowledged that the Fourteenth Amendment protected only against state action and not against wrongs by individuals, but said, p. 755, "This is not to say, however, that the involvement of the State need be either exclusive or direct". It held, pp. 756-57, that an allegation of causing Negroes' arrest by means of false reports that they had committed criminal acts was broad enough, as against a motion to dismiss, to cover a charge of connivance by state agents and, pp. 758-59, that the right to travel interstate is a constitutional right, although not explicitly mentioned in the Constitution. This, of course, could be just another example of the broad approach to the state action concept.

However, Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas, separately concurred, p. 761, not-

ing that the court avoided the question whether Congress could punish private conspiracies which interfered with Fourteenth Amendment rights. But he observed that, despite the Court's rejection of "any such connotation, * * * there now can be no doubt that the specific language of §5 [of the Fourteenth Amendment] empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights".

Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, p. 774, was specific. He felt that the statute reached a private conspiracy to interfere with equal utilization of state facilities, for this was interference with a right secured by the Constitution, within the statute's meaning, "without regard to whether state officers participated in the alleged conspiracy". P. 777. The statute was an exercise of congressional power under the Fourteenth Amendment's enabling clause. It prohibits all conspiracies. A right is "secured" by the Constitution "if it finds its source in the Constitution". He acknowledged that "an aspect" of the Civil Rights Cases confined the power of Congress but, p. 783, "I do not accept—and a majority of the Court today rejects—this interpretation of §5". He concluded that a majority "expresses the view today that §5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy". P. 782. See, also, the companion case of *United States* v. *Price*, supra, 383 U. S. 787 (1966), and

Appendix B

Mr. Justice Goldberg, concurring, in *Bell* v. *Maryland,* 378 U. S. 226, 286, 302-03, 305-11 (1964).

Hurd v. *Hodge* is not cited in *Heart of Atlanta, McClung, Guest,* or *Price.*

These recent opinions imply for us a change of course. Certainly the opinions in *Guest* indicate that the reasoning of the Civil Rights Cases is in the process of reevaluation, if not overruling, and that a court may not need to stretch to find state action if appropriate congressional legislation is present.

All this leads us at last to the basic issue in the present case. Does §1982, which is already on the books and which is derived from the Civil Rights Act of 1866, reach discrimination in private subdivision housing?

Three approaches are possible: That of the Thirteenth Amendment; that of the Fourteenth Amendment; and that of relating the private subdivision to a governmental function.

A. The Thirteenth Amendment. It may be argued that the right to purchase real property, a right assured by §1982, is violated when a seller refuses to do business with a willing negro purchaser. The Thirteenth Amendment theory here would have to be that such discrimination imposes a "badge of slavery". This is precisely the approach used by Judge Trieber in *United States* v. *Morris,* supra, 125 F. 322 (E.D. Ark. 1903). He there concluded that under the Thirteenth Amendment Congress has the power to protect the enjoyment of fundamental rights, "if the deprivation of these privileges is solely on account

of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment". P. 330.

There are, however, difficulties today with this Thirteenth Amendment approach. *United States* v. *Morris* seems to be the only supporting authority (other than, perhaps, Judge Edgerton's dissent, hereinabove noted, pp. 240-41 of 162 F.2d). The facts are not too clear, but that case has overtones of the deprivation of a right to pursue a vocation (farming) and thus seems to involve more than a simple right to purchase a home from an unwilling seller. Further, the reasoning in *Morris,* despite its having been decided later and despite its citation of the Civil Rights Cases, is basically contrary to the Civil Rights Cases where it was stated, pp. 21-25 of 109 U.S., that the denial of access to public accommodations was not the imposition of a badge of slavery. Also, *Hurd* v. *Hodge,* supra, so long as it stands free and unmolested in the reports, gives us great difficulty. As we have noted, the Supreme Court there stressed the 1870 reenactment and imposed upon §1982 a distinct and definite Fourteenth Amendment overlay with the state action limitation. While we feel that the implications of *Hurd* v. *Hodge* could be regarded as greatly offended and restricted by the sweep of the language in *United States* v. *Guest,* the Supreme Court did not itself express concern about *Hurd* v. *Hodge* and, indeed, did not even cite it. It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with

a limiting Supreme Court decision which, so far as we are told directly, remains good law.

B. The Fourteenth Amendment. Section 1982 was re-enacted under the authority of the Fourteenth Amendment. Clearly, therefore, the right to purchase property may not be encroached by state action. It is perhaps arguable that under the *Guest* rationale this right may not be violated by purely private action.

But what is this right to purchase? It is usually taken for granted that an owner may turn down any inquiring purchaser; in this sense there is no difference between a right to purchase possessed by a Negro and that possessed by a white. However, when the owner puts his property on the market, perhaps there is a difference. If it is placed on the market for whites only, whites have a right denied to Negroes. A right to purchase will be of limited scope if it can be denied or destroyed by those who place property on the market. See Robison, *The Possibility of a Frontal Attack on the State Action Concept,* 41 Notre Dame Law. 455 (1966).

On the other hand, there is a significant historical fact in all this. Clearly, one of the purposes of the Thirteenth and Fourteenth Amendments and of the 1866 Act and of §1982 was to give the Negro citizenship and the right to own property and thus to acquire and to dispose of it. These were abilities which he did not possess under slavery. They are more fundamental than an ability to purchase from a seller. No one here challenges the right of these plaintiffs to own or to acquire real property. That purpose of the Amendments has been entirely ful-

filled. But the plaintiffs claim a right to purchase a particular piece of property when the owner places it on the market. Is this, too, something which the Fourteenth Amendment goes so far as to reach?

There is another and opposing factor which deserves comment. A Fourteenth Amendment argument may have greater force in the case of the large real estate developer. He is in the business of selling homes and occupies a position somewhat different than that of the individual home owner. And a collateral supporting thesis was presented by Mr. Justice Douglas in his concurrences in *Garner* v. *Louisiana,* 368 U.S. 157, 176, 185 (1961), and in *Reitman* v. *Mulkey,* supra, where he asserted that when a business is licensed it is because the business is affected with a public interest; that the public, as a consequence, has rights in respect thereto; and that it would be unconstitutional for the state to license a public business for the use of one race only. Yet licensing and subdivision factors alone were not deemed to be "exertions of state power" even in *Ming* v. *Horgan,* supra.

Thus, the Fourteenth Amendment's approach presents us with difficulties.

C. Governmental function. The argument is that a housing development, even though privately financed and built, is in effect the equivalent of a municipality and, thus, the private developer is carrying on a governmental function requiring the application of non-discriminatory standards. It is said that the state plays an important part in the success of the private housing development. It does so by way of licensing and regulation of the real estate busi-

ness; zoning laws and building codes; required approval of subdivision plans; schools; utilities; police and fire services; and the like. In the private development a board of trustees usually manages the community, holds title to the streets, levies assessments for community services, and provides recreational facilities. It is asserted, then, that it is a denial of equal protection for the state to allow private persons discriminatorily to carry out what are governmental functions. See *Marsh* v. *Alabama,* 326 U.S. 501 (1946), where the Court imposed First and Fourteenth Amendment freedom of religion and press guaranties upon a company-owned town, and the white primary cases. *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Terry* v. *Adams,* 345 U.S. 461 (1953), where the Court imposed the Fifteenth Amendment guaranty upon private political parties performing state election functions. The relationship of ownership of real property to the sovereignty of the state may also be stressed.

The difficulties with any application of the governmental function argument are that, to a large extent, it relies on state inaction, rather than state action, see *Mulkey* v. *Reitman,* 64 Cal.2d 529, 413 P.2d 825, 834 (1966), affirmed —— U. S. ——; it relies upon state assistance which is non-discriminatory in itself; and it necessarily concerns the ever elusive judicial determination, as contrasted with a legislative one, of what is a governmental function.

It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind. It could do so by asserting that §1982 was, because of its derivation from the Thirteenth

Amendment, free of the shackles of state action despite what has been said in *Hurd* v. *Hodge*. It could do so by asserting that, even though §1982, because of its reenactment, was subject to Fourteenth Amendment limitations, we nevertheless have, on the accepted facts here, enough to constitute state action in the light of the expanding concept of that term. And it could do so on the ground, suggested in *Guest*, that state action is no longer a factor of limitation and that Congress has acted through §1982 to reach private discrimination in housing.

We feel, however, that each of these approaches, at the present time, falls short of justification by us as an inferior tribunal. The Thirteenth Amendment approach has been made hazy and obscure by the 1870 reenactment and by the pronouncements in *Hurd* v. *Hodge*. The Fourteenth Amendment approach still carries the condition of state action. And the governmental function approach finds little helpful majority precedent in a legion of decided cases. Those where relief has been granted involve factual elements of far greater depth and significance than are present here. On this complaint we do not even have the thin gloss of governmental agency mortgage service in Paddock Woods.

Relief for the plaintiffs lies, we think, in fair housing legislation which will be tempered by the policy and exemption considerations which enter into all thoughtfully considered statutes. Recent cases indicate that, if properly drawn, such legislation would encounter little constitutional objection. *United States* v. *Price*, supra, p. 789 of 383 U. S.; *Colorado Anti-Discrimination Comm'n* v. *Case*, 380 P.2d 34 (Colo. 1962); *Massachusetts Comm'n Against*

Discrimination v. *Colangelo,* 344 Mass. 387, 182 N.E.2d 595 (1962). The power exists but its exercise is absent. The matter, thus, is one of policy, to be implemented in the customary manner by appropriate statutes directed to the need. If we are wrong in this conclusion the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us.

A concluding word is indicated about the Supreme Court's very recent five to four decision in *Reitman* v. *Mulkey,* supra, —— U. S. —— (1967), concerning California's Proposition 14, added by initiative to that States's Constitution. The majority there concluded that positive state action "embodied in the State's basic charter, immune from * * * regulation at any level of the state government", as the California Supreme Court had found, was present and, being discriminatory, was violative of the Fourteenth Amendment. Mr. Justice Douglas, in concurrence, went further and, while perhaps recognizing that the situation might be different in "a case as simple as the one where a man with a bicycle or a car or a stock certificate or even a log cabin asserts the right to sell it to whomsoever he pleases", felt that the Court was dealing "with a problem in the realm of zoning", that "urban housing is in the public domain", and that "Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which *Shelley* v. *Kraemer, supra,* can be construed". The four dissenters, although conceding that the adoption of Proposition 14 by initiative con-

stituted "state action", concluded that it embraced no affirmative and purposeful governmental enforcement which fostered discrimination and that, as a consequence, there was no impermissible deprival of equal protection.

We therefore must assume that, because of licensing by Missouri of the defendants Alfred H. Mayer and Alfred Realty Co. as a real estate salesman and broker, Mr. Justice Douglas would conclude that our affirmance of the district court here is error. We feel, however, that the four dissenters, who were unimpressed with the fact of California licensing in *Reitman* v *Mulkey*, would be unimpressed with the fact of Missouri licensing here and would not find impermissible state action in the legislative vacuum of the present case. And we believe that the four members of the *Reitman* majority, who did not join Mr. Justice Douglas in the grounds stated for his concurrence, also would not be inclined to find much substance, so far as the present issue is concerned, in Missouri's licensing of the Mayers. We therefore conclude that our decision to affirm the district court in the present case is in line with the implications flowing from both the majority and the dissenting opinions in *Reitman* v. *Mulkey* and, indeed, is compelled by those opinions. The views entertained by Mr. Justice Douglas, of course, would require the opposing result.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[redacted]

In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The petition for a writ of certiorari presents the question whether the racially motivated refusal of the developer of a large residential subdivision to sell a house to Negroes contravenes federal law. In the view of the United States, the question is one of large public importance and merits this Court's review. We urge that the writ be granted.

1. The causes of the racial tensions which beset the Nation at the present time are many; but none, perhaps, is more fundamental than the situation in housing. Many Negroes are not only excluded from the experience of integrated living but are commonly denied decent living conditions, social services and educational and employment opportunities. One of the

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significant factors which has created, and tends to maintain, residential segregation is the widespread refusal of real estate developers to sell new suburban housing to Negroes.[1] Few issues tendered to this Court in recent years are more vital in their practical consequences than the legality of this practice.

2. The petitioners argue that the refusal to sell a house and lot to them in Paddock Woods constitutes a denial of equal protection of the laws within the meaning of Section 1 of the Fourteenth Amendment. To be sure, that provision is addressed to action by the State, not private individuals, and, nominally, no State official is implicated in the conduct of the developer here. But this Court has rejected a mechanical view of State action that would limit the protections of the Fourteenth Amendment to obvious exercises of governmental power. In *Marsh* v. *Alabama,* 326 U.S. 501, the Court held that the right of free speech extended to the privately owned streets of a company town. In *Shelley* v. *Kraemer,* 334 U.S. 1, it held that judicial enforcement of racially restrictive convenants violated the Fourteenth Amendment, since, as Mr. Justice Black explained in his dissenting opinion in *Bell* v. *Maryland,* 378 U.S. 226, 329, such covenants were "in reality the equivalent of and had the effect of state and municipal zoning laws, accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private con-

[1] We are advised that a significant proportion of new dwellings are being built in areas comparable to the developments involved here.

tracts, enforced by the State." And, just two Terms ago, in *Evans* v. *Newton,* 382 U.S. 296, the Court found sufficient indication of a public character in a private park in Macon, Georgia, to make the exclusion of Negroes from it unlawful State action.

These decisions—and others (*Terry* v. *Adams,* 345 U.S. 461; *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793; *Smith* v. *Allwright,* 321 U.S. 649)—establish the principle that a private individual who is permitted by the State to perform an essentially public function assumes, along with the governmental powers of the State, its constitutional obligations. We urge that the Court consider whether the facts of the present case bring it within the scope of this rule. According to the allegations of the complaint (which must be taken as true, since the case was dismissed at the pleading stage), the petitioners were refused on racial grounds the right to purchase a house and lot in a large real estate development otherwise open to the public. When completed, the development will house 1,000 people and form part of an even larger complex of similar developments constructed in the area by the same developer with financing by the Federal Housing Administration. This complex—which will house a total of some 2,700 families—will include recreational facilities (golf course plus tennis and bath club) built by the developer for the primary benefit of the residents. The developer has laid out streets for the use of the residents and has undertaken to provide such community services as garbage collection, all controlled by a board of trustees

appointed by him. The board will also have the legal authority to levy assessments and to collect them through judicial action.

Involved here, in short, is the creation of a complete suburban community. To fence out Negroes from such a community would appear to be essentially no different from fencing them out from a company town, a private park, or (by means of racial restrictive covenants) an already developed residential area.

3. Petitioners urge as an alternative basis for upholding the complaint—assuming the State is not sufficiently implicated to justify invoking the Equal Protection Clause itself—that this case falls within Section 1978 of the Revised Statutes, 42 U.S.C. 1982, which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." To be sure, literally read, the provision could be viewed as merely lifting the former total disability of slaves to acquire rights in real property, but that limited interpretation was rejected long ago. *Buchanan* v. *Warley,* 245 U.S. 60; *Harmon* v. *Tyler,* 273 U.S. 668; *Richmond* v. *Deans,* 281 U.S. 704; *Hurd* v. *Hodge,* 334 U.S. 24. Those cases hold expressly that any substantial "fencing out" of Negroes from an area is forbidden by Section 1978, and that is certainly the effect here.

The more difficult question here is whether the statute reaches wholly private action. We recognize that in *Corrigan* v. *Buckley,* 271 U.S. 323, the Court took the view that it did not. But that decision was

premised on the supposition that Section 1978 was Fourteenth Amendment legislation and that Congress lacked power to implement the Equal Protection Clause by controlling the conduct of private persons. It is arguable, however, that the provision—originally enacted in 1866 (Act of April 9, 1866, § 1, 14 Stat. 27) before the Fourteenth Amendment was adopted—permissibly implements the Thirteenth Amendment by removing a vestige of slavery. And, at all events, it may be appropriate to reconsider *Corrigan* in light of the prevailing view with respect to congressional power under the Fourteenth Amendment. We take it as now settled that a construction of Section 1978 as guaranteeing the enumerated rights against private abridgment would encounter no *constitutional* obstacle—even if the section were viewed as wholly Fourteenth Amendment legislation. See *United States* v. *Guest*, 383 U.S. 745, 761–762 (concurring opinion of Mr. Justice Clark), 774–784 (separate opinion of Mr. Justice Brennan); *Katzenbach* v. *Morgan*, 384 U.S. 641.

Nothing in the text of Section 1978 limits its reach to action by State officials.[2] Although other provisions

[2] In its original form, the provision ended with the phrase "any law, statute, ordinance, regulation or custom to the contrary, notwithstanding." Putting aside the *dictum* in the *Civil Rights Cases*, 109 U.S. 3, 16, we view these as words of emphasis, not of limitation—like the comparable words of the Supremacy Clause of the Constitution. U.S. Const., Art. VI, cl. 2. The sense of the provision, as we read it, is that equality of civil rights is guaranteed even as against hostile State enactments. But freedom to enjoy those rights free of racial discrimination is secured also where no State law compels or authorizes the interference, indeed, even where State law prohibits it. Cf.

of the Act in terms dealt only with conduct taken "under color" of State law (*e.g.*, § 2, now 18 U.S.C. 242), it is arguable that the more sweeping outlawry of discriminations based on race invoked here was not similarly confined. That would not be inconsistent with other civil rights legislation of the period.[3] Moreover, one need not judge the matter entirely from the limited viewpoint of 1866. Because the central preoccupation of that time was to combat classical State action in the form of the Black Codes,[4] it was natural for the Congress to focus its remedy on those who would enforce or invoke those hostile laws. The reenactment of the statute in 1870,[5] in changed circumstances, may well have had a broader objective. At that point the Nation was concerned with unofficial action and it is reasonable to suppose

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Monroe v. *Pape*, 365 U.S. 167. This reading is, of course, consistent with the Revision of 1874 which deleted the quoted phrase, presumably as surplusage. See R.S. § 1978.

[3] Thus, while Sections 2 and 3 of the Enforcement Act of May 31, 1870 (16 Stat. 140) reached only officers, Section 4 (invalidated in *United States* v. *Reese*, 92 U.S. 214), Section 5 (invalidated in *James* v. *Bowman*, 190 U.S. 127), and Section 6 (now 18 U.S.C. 241), reached private conspiracies as well. So it is with the Ku Klux Act of April 20, 1871 (17 Stat. 13): Section 1 (now 42 U.S.C. 1983) reached only acts done "under color" of State law, but Section 2 (the criminal portion of which was declared unconstitutional in *United States* v. *Harris*, 106 U.S. 629, and *Baldwin* v. *Franks*, 120 U.S. 678, the civil provision surviving as 42 U.S.C. 1985) encompassed private conspiracies. And the pattern is the same in the Act of March 1, 1875 (18 Stat. 335): Sections 1 and 2 (invalidated in the *Civil Rights Cases*, 109 U.S. 3) reached private action, while Section 4 (sustained in *Ex Parte Virginia*, 100 U.S. 339, now 18 U.S.C. 243) reached only officials.

[4] Even then, however, there were occasional indications of a broader concern. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., Part 2, 1120, 1124, 1160.

[5] Act of May 31, 1870, § 18, 16 Stat. 140, 144.

that the Congress which dealt most explicitly with private conspiracies (see 18 U.S.C. 241) likewise intended to reach unofficial interference with the rights guaranteed by the provision here at issue.[6] The later reenactment in the Revisions of 1874 and 1878 appear to point in the same direction.[7] Thus, there may be sound basis for arguing that Section 1978 forbids private action which, in practical effect, frustrates the right of the Negro to live in the community of his choice.

In conclusion, we stress that this case does not involve the validity of a single, isolated refusal to sell to a Negro when comparable housing in the same area is readily available to him. Such an individual act of dis-

[6] Indeed, the decision in *Hodges* v. *United States*, 203 U.S. 1, seems to so assume with respect to the rights guaranteed by Section 1977, the companion provision also derived from Section 1 of the Act of 1866. The holding that Congress cannot constitutionally reach an unofficial conspiracy interfering with the exercise of the right to contract has been qualified by recent decisions. See, also, the *dictum* of Mr. Justice Bradley, on circuit, in *United States* v. *Cruikshank*, 1 Woods 308, 319, 25 Fed. Cas. 707, 712, in which he apparently construes Section 1978, together with 18 U.S.C. 241, as protecting the right of a Negro to lease a farm against the interference of a wholly private conspiracy of hostile whites.

[7] Between 1870 and 1878, Congress had twice more addressed itself to private action interfering with the exercise of federal rights. See § 2 of the Ku Klux Act of April 20, 1871, and §§ 1 and 2 of the Act of March 1, 1875, both discussed at n. 3, *supra*. It is also noteworthy that the Revised Statutes expanded the practical scope of both of the other surviving provisions of the Civil Rights Act of 1866—Section 2, the criminal provision, reenacted as R.S. § 5510 (now 18 U.S.C. 242); and Section 3, the removal provision, re-enacted as R.S. 641 (now 28 U.S.C. 1443). See *Screws* v. *United States*, 325 U.S. 91, 98–100, 120; *Georgia* v. *Rachel*, 384 U.S. 780, 788–789. Cf. *United States* v. *Mosley*, 238 U.S. 383, 386–388.

crimination may well be beyond the reach of the Equal Protection Clause and of Section 1978. The only issue here is whether a discriminatory course of conduct which has the effect of wholly excluding Negroes from an entire community is not so substantial an abridgment of the right to acquire property as to offend the statute or so like an exercise of governmental power as to fall under the ban of the Constitution. In our view, the question is substantial and merits this Court's consideration.

Respectfully submitted.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

v.

ALFRED H. MAYER COMPANY, *et al.*,

Respondents.

BRIEF OF HENRY S. REUSS
Amicus Curiae

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In the

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October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

v.

ALFRED H. MAYER COMPANY, *et al.*,

Respondents.

BRIEF OF HENRY S. REUSS

Amicus Curiae

QUESTION INVOLVED

Does the seller or renter of real property have a constitutionally valid federal statutory duty to treat all citizens wishing to purchase or lease as he would white citizens?

THE FACTS

The complaint alleges the following facts, which are deemed true, since this case comes here on a motion to dismiss:

The petitioners, husband and wife, are Negroes residing in the city of St. Louis, Missouri. Attracted by newspaper advertisements, they inspected houses in the Paddock Woods

subdivision in St. Louis County, which the respondents were building and selling to the general public. The petitioners sought to purchase a home in the subdivision, but the respondents refused to consider their application solely because the respondents have a "general policy not to sell said houses and lots to Negroes." (R.4)

The respondents are an individual and three corporations he controls which are developing, constructing and selling homes in the Paddock Woods subdivision. The subdivision has over 100 homes. More will be constructed, to form a suburban community in St. Louis County housing over 1000 persons, with streets, utilities, a community golf course, tennis and other recreation facilities.

The corporations are incorporated under Missouri law. The respondents operate their business under licenses issued by Missouri and under "various state laws and local ordinances, in particular zoning codes, building codes, banking and lending laws, and numerous laws effecting the transfer and development of real property". Their plans are approved by the County Building Commissioner. Sewer service is furnished by the Metropolitan Sewer District. The zoning plans, "which will assure that this subdivision will retain its value as a successful residential area", are accomplished by the County Planning Commission and the County Council. Transfers of property in the subdivision, including the trust indenture which will restrict uses within the subdivision, will be recorded by the County Recorder of Deeds. Numerous state offices, such as the traffic and highway departments, and the county engineer, will contribute time and resources to the success of the subdivision: The children in the subdivision will be educated in tax-supported schools. State-licensed utilities will furnish electric and gas services to the homes and facilities in the subdivision.

Moreover, Paddock Woods is not an isolated community. It is "enlarged" by the respondents' "other nearby developments" (Paddock Estates, Paddock Meadows, and Wedgewood), all of which are financed by loans insured by the

Federal Housing Administration. These developments comprise a community of some "2700 families".

Paddock Woods will be subject to deed restrictions which will govern the use made by purchasers of the lands and homes in the subdivision. A Board of Trustees appointed by the individual respondent will provide community services, including refuse collections, and have the power to "levy assessments". Such restrictions and assessment authority would be enforceable through judicial action. These functions and powers, the petitioners allege, are "the equivalent of the power to design and enforce zoning ordinances and the power to function as municipal government generally . . . and is in fact an extension or subdivision of the state's authority." (R.5-9)

ARGUMENT

I. THE ACT OF APRIL 9, 1866 – GIVING "ALL CITIZENS, OF EVERY RACE AND COLOR . . . THE SAME RIGHT . . . TO PURCHASE, LEASE, HOLD . . . REAL PROPERTY . . . AS . . . WHITE CITIZENS" – OUTLAWS RACIAL DISCRIMINATION, PUBLIC OR PRIVATE, IN SALES OR RENTALS OF ALL HOUSING CONSTITUTIONALLY REACHABLE BY THE COMMERCE CLAUSE.

A. The Act of April 9, 1966 means what it says – fair housing throughout the land.

In 1865 and 1866, the southern state legislatures enacted a series of Black Codes, consigning the Negro to the position of legal inferiority.

On April 9, 1866 Congress, overriding the veto of President Andrew Johnson, enacted the Act of April 9, 1866. That Act provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and

color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec.2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, *or* both, in the discretion of the court.[1]

---

[1] The Act of April 9, 1866 was made subject to the revision of December 1, 1873, known as Revised Statutes of the United States, 1873, reprinted in 1877. Section 1 of the Act of April 9, 1866 became Section 1978 of the Revised Statutes (42 U.S.C., Section 1982), and reads as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 2 of the Act of April 9, 1866 disappears, but is partially reenacted (with civil liability substituted for criminal liability) as Sec-

. This language was first enacted by Congress weeks earlier, on March 13, 1866. On March 27, 1866, President Johnson in his veto message said:

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tion 1979 of the Revised Statutes (42 U.S.C., Section 1983), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1979 of the Revised Statutes in terms reenacts Chapter 22, Section 1 of the Civil Rights Act of April 20, 1871 (17 Stat. 13) which provides:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

In this Brief, whenever Sections 1 or 2 of the Act of April 9, 1866 are referred to, the reference includes their reenactment in Revised Statutes of 1873.

> "In all our history, in all our experience as a people living under federal and state law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race. They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State – an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States."[2]

Congress, in overriding the veto, knew what it was doing – "interfering, for the security of the colored race, with the relations existing between inhabitants of the same state."

It should be noted that Congress, in enacting the Act of April 9, 1866, did not simply endow all citizens with the right to be free of state-imposed discrimination in housing. In Section 1, it gave citizens of every race and color the same right to purchase or lease real property as that enjoyed by white citizens.[3] In Section 2, it went on to make guilty of a misdemeanor any person who, under color of any law "or custom", deprived another of that right.[4]

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[2] 8 Richardson, *A Compilation of the Messages and Papers of the Presidents*, at 3610-11 (1897).

[3] Reenacted by Section 1978, Revised Statutes of 1873 (42 U.S.C., Section 1982).

[4] Reenacted by Section 1979, Revised Statutes of 1873 (42 U.S.C., Section 1980), substituting for "misdemeanor" "an action at law, (or) suit in equity".

A study of the legislative history of the Act of April 9, 1866 yields nothing that collides with its straight-forward meaning.[5]

The respondents are constructing and operating their Paddock Woods subdivision pursuant to a whole host of laws, ordinances, regulations, and "customs" - particularly, the widespread "custom" of denying open housing to Negroes.

Here the petitioners are clearly citizens who have been denied the same right in the purchase of real estate as white citizens enjoy, under Section 1 of the Act of April 9, 1866. And they have been denied this right by the respondents, who are depriving them of their rights under color of laws and customs, within the meaning of Section 2 of the Act of April 9, 1866.

The cases are clear that where a statute imposes a duty, persons who are beneficiaries of that duty are enabled to bring civil suit, for injunction or damages, for violation of that statutory duty.

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[5]See Flack, Horace Edgar, *The Adoption of the Fourteenth Amendment* (1908), pp. 11-54. As with the legislative history of the almost-contemporary Fourteenth Amendment, what Congress had in mind cannot be determined with any degree of certainty. As was said in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 489 (1954): "Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the view of propenents and oppents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among all persons born or naturalized in the United States. Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What they in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."

Wyandotte Transportation Co. v. United States, ___ U.S. ___, 36 U.S. Law Week 4026 (No. 31; December 4, 1967), at page 10, slip copy, citing with approval: *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *North Bloomfield Gravel Mining Co. v. United States*, 88 F. 664, 678-679 (CA 9, 1898); *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 208-209 (CA 6, 1961); *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (CA 2, 1947); Restatement (Second), Torts, Sec. 286.

This principle has been endorsed in numerous cases holding that a person who has been subjected to racial discrimination, in violation of a nondiscrimination statute which contains only penal sanctions, may sue civilly for damages.

WASHINGTON: *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 194 Pac. 813 (1921); *Randall v. Cowlitz Amusements*, 194 Wash. 82, 76 P.2d 1017 (1938); *Powell v. Utz*, 87 F. Supp. 811 (D.C. E.D. Wash., N.D., 1949).

IOWA: *Amos v. Prom*, 117 F. Supp. 615 (D.C. N.D. Iowa, C.D., 1954); *Humburd v. Crawford*, 128 Iowa 743, 105 N.W. 330 (1905); *Brown v. J. H. Bell Co.*, 146 Iowa 89, 123 N.W. 231, 124 N.W. 901 (1910). See also *Rice v. Sioux City Memorial Park Cemetery*; 349 U.S. 70, 76 (1955) recognizing availability of a civil action.

MICHIGAN: *Bolden v. Grand Rapids Operating Co.*, 239 Mich. 318, 214 N.W. 241 (1927); *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890).

U.S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT: *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (1956).

Other cases involving application of the same principle are: *Goldstein v. Groesbeck, et al.*, 142 F.2d 422 (1944), *cert. den.*, 323 U.S. 737 (1944); *Fischman v. Raytheon Mfg. Co., et al.*, 188 F.2d 783 (1951).

Hence, the petitioners have a valid statutory right, which the respondents are obliged to respect, and the failure of the respondents to respect the petitioners' statutory right

renders the respondents subject to this civil suit by the petitioners. This proposition is strengthened by the fact that the reenactment of Section 2 of the Act of April 9, 1866, in Section 1979, Rev. Stat. 1873, expressly includes civil liability.

It is certainly true that Congress, in enacting the Act of April 9, 1866, handed the courts a good deal of discretionary authority when it endowed all citizens with "the same right to purchase, lease, and hold real property as white citizens". But it is by no means the first time that Congress has vested the courts with large discretionary authority. One recalls the phrase "combination in restraint of trade" which Congress devolved upon the courts in the Sherman Act of 1890, and the phrase "public convenience and necessity" which in so many aspects of administrative law becomes a matter for the Supreme Court, in the final analysis, to determine.

There remains for consideration whether the Fourteenth Amendment (passed by the U.S. Senate on June 8, 1866, by the House on June 13, 1866 and certified finally by the Secretary of State on July 28, 1868), and various laws enacted to implement the Fourteenth Amendment, in any way narrowed the authority of the Act of April 9, 1866, because the Fourteenth Amendment, and later legislation adopted pursuant to the Fourteenth Amendment, are directed at prohibiting "state action", rather than action by private persons, which impairs privileges and immunities and equal protection.

The language of Mr. Chief Justice Vinson, in speaking for five of the six justices who passed on the case, in *Hurd v. Hodge*, 334 U.S. 24 (1948), does not really narrow the 1866 Act. The Court said (pp. 31-32):

> "In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment, for that statute and the amendment

were closely related both in inception and in the objectives which Congress sought to achieve. . . . It is clear that in many significant respects the statute and the amendment were expressions of the same general Congressional policy."

The Court was in effect saying that governmental action – in the *Hurd* case, action by a court confronted with the enforcement of the racially restrictive covenant in the District of Columbia – was prohibited by both the Act of April 9, 1866, and by federal public policy deriving from the later Fourteenth Amendment. The fact that both dealt with governmental action in no way indicates that the earlier act – the Act of April 9, 1866 – did not also deal with private action, which in fact it clearly did.

B. *The Act of April 9, 1866, is constitutionally valid under the commerce clause.*

We have seen that the Act of April 9, 1866 gives the petitioners a right, and imposes on the respondents a duty, of non-discriminatory treatment in the sale or lease of property in Paddock Woods. The petitioners' amended complaint is thus sustainable *provided the Act of April 9, 1866 is constitutionally valid.*

We start out with the well-established presumption of a statute's constitutionality. 16 Am. Jur. 2d, Section 172. The specific basis for validity is the Congressional power over interstate commerce under Article 1, Section 8 of the Constitution.

The construction, financing, sale, and rental of housing has an enormous impact on interstate commerce. Millions of tons of lumber, iron, bricks, and other building materials and products associated with the construction and improvement of homes move across state lines.[6] So do vast amounts

[6] In 1963, 92,119 tons of portland cement, 108,581 tons of lumber, shingles, and lath, and 41,379 tons of plywood veneer were moved

of the mortgage funds which finance the construction of residences throughout the country.[7] And millions of people change their residence each year by moving to other States.[8]

Moreover, racial discrimination in housing directly injures interstate commerce. It substantially reduces the construction of new homes for Negroes,[9] impairs their movement across State lines, and in numerous other ways adversely affects the interstate movement of material and people.

The power of Congress over interstate commerce and matters affecting such commerce is broad and comprehensive. Congress can prohibit or regulate acts by private persons which affect interstate commerce, including acts of racial discrimination. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The power of Congress over matters affecting interstate commerce does not depend on whether the particular materials or persons are then flowing in the channels of commerce. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-36 (1937); *Katzenbach v. McClung*, 379 U.S. 294 302-305 (1964); *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946).

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across state lines by railroad. Hearings before Subcommittee No. 5, House Committee on the Judiciary, May, 1966, p. 1360.

[7]In 1964, Mutual Saving Banks held 39.3 percent of their mortgage holdings on real estate located in another state. Hearings before Subcommittee No. 5, House Committee on the Judiciary, May, 1966, p. 1362.

[8]The increasing mobility of the American people emphasizes the national scope and character of the housing industry. Each year, one in five Americans moves to another home. "Americans at Mid-Decade", U. S. Department of Commerce, Bureau of the Census, March, 1966.

[9]If housing were offered on an open basis, the demand for dwellings and for all the materials which go into a housing unit would be substantially increased. Testimony of Hon. Robert C. Weaver before Subcommittee No. 5, House Committee on the Judiciary, May, 1966, p. 1373.

Nor is the power of Congress dependent on whether the effect which the particular case has on commerce is large or small. For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court upheld the power of Congress to apply acreage limitations under the Agricultural Adjustment Act of 1938 to a farmer who sowed only 23 acres and produced from less than 12 acres of excess acreage only 239 bushels of wheat for use on his own farm. In *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946), this Court applied the Fair Labor Standards Act to a newspaper which had a daily circulation of only 9,000 to 11,000 copies, and mailed only about 45 of those copies to another state.

Moreover, the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . ." *United States v. Darby*, 312 U.S. 100, 118 (1941). See also *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States v. Sullivan*, 332 U.S. 689 (1948).

These decisions make it clear that Congress is constitutionally empowered to enact legislation prohibiting private persons from engaging in racial discrimination in the sale or rental of residential housing. The Act of April 9, 1866, is precisely such legislation.

II. THE RESPONDENTS ARE ALSO SUBJECT TO THE FOURTEENTH AMENDMENT, AND ITS IMPLEMENTING LEGISLATION, BY REASON OF THEIR INVOLVEMENT WITH STATE AND LOCAL LAWS AND SERVICES.

The right to acquire land has always been regarded as a fundamental aspect of status, power, freedom and security, and, indeed, as one of the essential distinctions between slavery and freedom. The consistent denial to slaves of the right to purchase, hold, or sell property was everywhere understood as a fundamental incident of slavery. Therefore,

almost immediately after the Civil War and the Thirteenth Amendment abolished slavery, Congress enacted legislation to prevent the perpetuation of slavery through the continued use against the former bondsmen of the principal incidents which constituted the status of slavery. Section 1 of the Act of April 9, 1866 enunciated, among other basic rights of free men, "the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ."

For a time following the Civil War, the discriminations against Negroes engendered in a slave-holding society were being eroded.[10] But as America moved into the 20th Century the forces of prejudice resurged, and after this Court endorsed segregation by race as the substitute for the former dominance by the master over the slave (*Plessy v. Ferguson*, 163 U.S. 537 (1896)), the Negro in America became virtually submerged into a status scarcely above that of slavery.

Segregation was the objective. As the cities grew, racial exclusion from neighborhoods became the tool for achieving that objective. Many cities enacted ordinances to establish racial residential zoning. These were stricken down as unconstitutional after more than a generation of litigation. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Harmon v. Tyler*, 273 U.S. 668 (1927); *Richmond v. Deans*, 281 U.S. 704 (1930); *Glover v. Atlanta*, 148 Ga. 285, 96 S.E. 562 (1918); *Bowen v. Atlanta* 159 Ga. 145, 125 S.E. 199 (1924); *Jackson v. State*, 132 Md. 311, 103 Atl. 910 (1918); *Clinard v. Winston-Salem*, 217 N.C. 119, 6 S.E.2d 867 (1940); *Allen v. Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (1936); *Liberty Annex Corp. v. Dallas*, 289 S.W. 1067 (Tex. Civ. App. 1927), *aff'd*, 295 S.W. 591, 19 S.W.2d 845; *Irvine v. Clifton Forge*, 124 Va. 781, 97 S.E. 310 (1918); *Birmingham v. Monk*, 185 F.2d 859 (C.A. 5, 1951), *cert. den.*, 341 U.S. 940 (1951).

[10] Woodward, C. Vann, *The Strange Career of Jim Crow* (1957).

Efforts to circumvent these court decisions brought about the hey-day of the restrictive covenant. Designed to accomplish the same objective of racial segregation by excluding Negroes from large portions of the cities and most of the suburban developments, these covenants strategically blocked and surrounded the existing racial ghettos, and through court enforcement accomplished precisely the same function as the racial zoning ordinances. These covenants were widely upheld by the courts of at least 18 States plus the District of Columbia, which for many years mistakenly assumed that this Court's decision in *Corrigan v. Buckley*, 271 U.S. 323 (1926) had fully blessed them. See 3 A.L.R.2d 466, 474-77 (1949).

A generation of litigation was required before this Court ruled that the Fourteenth Amendment precluded enforcement of the "unworthy covenant", either by injunction or by money damages, as a device for maintaining residential racial segregation. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Barrows v. Jackson*, 346 U.S. 249, 259 (1953).

During these years the Federal government also fostered residential segregation, by encouraging and often requiring restrictive covenants in deeds where federal mortgage insurance or guarantees were sought. Because of the vast extent of Federal home mortgage operations racial covenants, routinely included in most deeds, thus helped create and maintain throughout the country thousands of segregated neighborhoods involving millions of people.[11]

In sum, racial residential segregation in modern American cities and suburbs is the result of a long history of governmental participation in encouraging, fostering and compelling it, in clear violation of the Fourteenth Amendment. To suggest that this history of government involvement is no longer relevant is to blind one's eyes to the facts of American life and the history of the development of its cities.

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[11] Abrams, Charles, *Forbidden Neighbors*, 234-236 (1955).

This case illustrates the continued pervasive involvement of government in the rising level of racial residential segregation in our urban society. For without the framework of the multi-faceted laws and mechanisms of local and state government, including corporation and licensing laws, zoning, highways, public schools, utilities and sewers, planning commissions, and financing, underpinned by government funds, efforts, and involvement, the respondents in this case could not possibly make a go of their subdivision developments. They are building whole communities and in effect exercising functions and powers equivalent to those of a municipality.

The respondents have passed beyond the purely private sphere. Their broad community involvement now makes them subject to the principle that when private persons, with the consent or acquiescence of the State, perform functions which are essentially the same as those performed by a government, they become subject to the constitutional obligations of government under the Fourteenth Amendment.

Thus, in *Marsh v. Alabama*, 326 U.S. 501 (1946), a company which owned all the land, including the streets, of a town having over 1500 residents, sought to prevent an outsider from distributing religious literature in the streets. When he refused to leave, he was charged and convicted of violating a general (nondiscriminatory) trespass statute. This Court pointed out "that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the" exercise of the constitutional right, under the First Amendment, to distribute religious literature. (326 U.S. at 505) Therefore, said this Court, the totality of private ownership of the town could not abridge that constitutional right, and the State is not justified in "permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties" (326 U.S. at 509). Although the *Marsh* case came to this Court

in the context of a trespass conviction imposed by a court as an organ of government, it is entirely clear that that decision would also preclude legal power in the company to use self-help to eject the literature distributor from the streets of the company town.

The series of cases culminating in *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) makes it clear that any group, no matter how "private" its guise, which governs the choice of elected public officials, is subject to the constitutional requirements against racial discrimination.

This Court has applied the principle in a variety of areas. Thus, a labor union which takes upon itself the function of collective bargaining for its members, and making contracts which would be binding upon them, as authorized by the labor laws, becomes subject to the same restrictions against racial discrimination as are applicable to a government. *Steele v. Louisville & Nashville Rd. Co.*, 323 U.S. 192 (1944); *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952).

In *Evans v. Newton*, 382 U.S. 296 (1966), this Court dealt with a 100-acre tract devised to the City of Macon, Georgia, as a park and pleasure ground for white people only, and operated for many years as part of the City's park system "open to every white person, there being no selective element other than race". (382 U.S. at 301). To facilitate avoidance of the Fourteenth Amendment's ban on racial discrimination, the City trustees were replaced by private trustees. This Court ruled that the park had become imbued with such public character, public function and public responsibility that the substitution of private trustees could not disentangle the park from the restraints of the Fourteenth Amendment, "regardless of who now has title under state law". (382 U.S. at 302). This Court said: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental

character as to become subject to the constitutional limitations placed on state action." (382 U.S. at 299).

In *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952), this Court recognized that a private utility operating under the regulatory supervision of a Public Utilities Commission may be so closely affected by the orders or permission of the Commission that the private utility is subject to the constitutional prohibitions against depriving its clientele of their constitutional rights.

In sum, when the respondents undertook to create complete suburban communities, which partake of many of the aspects and functions of municipalities, they also undertook the obligations which the Constitution imposed upon municipalities, including the obligation not to fence out people solely because of their race.

The respondents, then, are subject to the restraints of the Fourteenth Amendment because their operations in the construction and management of a complete suburban community are imbued with municipal and state functions, and are facilitated by municipal and state aid. But even if the respondents are not sufficiently linked with "state action" to bring them within the direct application of the Fourteenth Amendment, they are subject to Section 1 of the Act of April 9, 1866, reenacted as Section 1978 of the Revised Statutes of 1873 (42 U.S.C. 1982), which is valid under Section 5 of the Fourteenth Amendment, providing that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article" – namely privileges and immunities, due process, and equal protection.

Section 1 of the Act of April 9, 1866 gives the petitioners a right "to inherit, purchase, lease, sell, hold, and convey real and personal property" that is as good – indeed "the same" – as any white citizen has. If a white citizen, can purchase property anywhere, so can a Negro. If a Negro is precluded, solely because of his race, from purchasing property that a white citizen could purchase, the statute is not

satisfied by a showing that the Negro could purchase property elsewhere. His right to purchase, free of racial distinctions, is to be "the same" as that of any white citizen, in every State and Territory. That right may not be taken away by state law (*Buchanan v. Warley, supra*), or by conditions in agreements or deeds enforced either by injunction (*Shelley v. Kraemer, supra; Hurd v. Hodge, supra*), or by money damages (*Barrows v. Jackson, supra*), or by administrative action (*Banks v. Housing Authority of the City of San Francisco*, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. den.*, 347 U.S. 974 (1954); *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954)).

It is true that the discriminatory impact in each of these cases flowed from some form of affirmative government action, either legislative, judicial or administrative. But the statute can also be violated by discriminatory action stemming from private persons. For example, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), which held that the Fourteenth Amendment prohibited racial discrimination by a private restaurant operating in premises leased from a government agency, the only action by the government was its failure to prevent the lessee from discriminating while in the leased premises. This Court emphasized (365 U.S. at 725): ". . . no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

It is also true that in *Corrigan v. Buckley*, 271 U.S. 323 (1926), this Court held that Section 1 of the Act of April 9, 1866 does not apply to "contracts entered into by private individuals in respect to the control and disposition of their own property". (271 U.S. at 331) That ruling rested on the narrow view expressed in *Civil Rights Cases*, 109 U.S. 3, 11 (1883) that the power of Congress under Section 5 of the Fourteenth Amendment is limited to enacting legislation

"for correcting the effects of . . . prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." However, such restrictive interpretation of the power of Congress makes Section 5 virtually superfluous, since Section 1 of the Fourteenth Amendment directly invalidates "prohibited State laws and State acts". *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966).

The foundation for the narrow view espoused in *Civil Rights Cases* has been undermined by this Court's more recent ruling in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and by the views expressed by six of the Justices in *United States v. Guest*, 383 U.S. 745, 761-62, 774-84 (1966). In the *Morgan* case, this Court quoted with approval the prescient words of *Ex Parte Virginia*, 100 U.S. 339, 345 (1880): "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." (384 U.S. at 648)

Justice Brennan's opinion in the *Guest* case characterized Section 5 of the Fourteenth Amendment as "a positive grant of legislative power" which authorizes Congress to enact legislation "to achieve civil and political equality for all citizens". (383 U.S. at 784).

The *Morgan* case further holds (a) that Section 5 encompasses the "same broad powers" as are granted to Congress under the Necessary and Proper Clause (U.S. Constitution, Art. I, Sec. 8, cl. 18) to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . powers vested by this Constitution in the Government of United States," and (b) that the boundaries of such legislative power are as broad as those formulated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 421 (1819), namely:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Accordingly, as Justice Clark's opinion in the *Guest* case put it, "the specific language of Section 5 empowers the Congress to enact laws" to prohibit private persons, "with or without state action", from interfering with or abridging rights guaranteed under Section 1 of the Fourteenth Amendment.

It is well settled that Section 1 of the Act of April 9, 1866, creates a right to acquire, hold and sell property free from impairment by any action of the state. (*Buchanan v. Warley, supra; Hurd v. Hodge, supra*). It is within the competence of Congress, therefore, to decide that private persons shall be forbidden to do anything which impairs that right. By taking over so many of the functions that would otherwise fall upon a municipal government (e.g., sewer and garbage collection, levying assessments, constructing streets, restricting usage of property in conformity with zoning plans), while at the same time excluding Negroes from the community solely because of their race, the respondents have, in effect, interfered with the state's responsibility to maintain the petitioners' right under Section 1 of the Act of April 9, 1866 at the "same" level as that of white citizens of the general public. Viewed in this light, Section 1 of the Act of April 9, 1866 is a constitutional exercise of the power of Congress to protect petitioners' right to purchase, lease, or hold real property against the discrimination of private persons, as well as of the agencies of state government.

The right created by Section 1 of the Act of April 9, 1866 has its correlative duty – not to deprive the citizen of his right to non-discriminatory housing – in two statutes: (1) Section 2 of the Act of April 9, 1866 (reenacted with slight changes by Section 1979, Revised Statutes of 1873, 42 U.S.C. 1983), imposing civil liability upon persons who deprive another of his rights under color of law or "custom"; and (2) 18 U.S.C., Section 241, imposing criminal liability upon persons who "conspire to injure" another in the en-

joyment of his rights.[12] Since the petitioners in the case at bar are within the class of persons these statutes aim to protect, they are entitled to civil relief against the respondents. See cases cited in this Brief, supra, p. 8).

III. THE QUESTION OF FAIR HOUSING HERE RAISED VITALLY AFFECTS THE NATIONAL INTEREST.

This Court's determination that the Act of April 9, 1866 means what it says, and that it is constitutionally valid, could set at rest the divisive question of non-discriminatory housing, a question which threatens to tear the nation apart.

The custom of discriminating against non-whites in housing is everywhere prevalent. It produces the segregated living patterns evident in all our large urban areas. It involves a denial of the inherent right of equal protection of the laws. It leaves psychological scars on millions of Americans, both black and white, who are enjoined by custom from living among neighbors whose skin is of a different shade.

It casts a pall not only over housing itself, but also over employment and education and health and law enforcement and domestic tranquility.

Housing

Segregated housing means inferior housing. Negro Americans occupy a disproportionately large portion of the substandard housing in this country, particularly in urban areas. Negro areas are more densely populated. In Harlem – America's best-known Negro ghetto – almost 240,000 people live in a three and one-half square mile area – one hundred peo-

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[12] Criminal prosecution under 18 U.S.C., Section 241 would be most unlikely, in view of the requirement that specific intent be proven pursuant to the rule of *Screws v. United States*, 325 U.S. 91 (1945) and *Crews v. United States*, 160 F. 2d 746 (CA 5, 1947).

ple per acre. Ninety percent of this housing is more than 30 years old, and nearly half was built before 1900.[13]

The housing of non-white families is consistently of poorer quality than that of white households in the same income levels. This is because the non-white families do not have freedom of choice in the selection of their homes. With the non-white demand for sales and rentals concentrated in the ghetto area, a substandard home in a ghetto is inferior in quality, and more expensive in price than homes available in the rest of the metropolitan community.

In 1960, 44 percent of all non-whites lived in substandard housing, as compared to 13 percent of the white families. Sixty-two percent of the non-white households rented, as compared to 36 percent of the white households. Forty-eight percent of the non-white renters lived in substandard units, as against 19 percent of the whites.

Three times as large a proportion of non-white families (28 percent) lived in overcrowded homes as did white households (10 percent).

This overcrowding was prevalent in all income classes. For example, of non-white families with incomes of $6,000 or more, 25 percent lived in overcrowded conditions. This compares with only 9 percent for whites in the same income classes.[14]

Employment

Segregation in housing adds to the joblessness of Negroes and other minority groups, already at least double the national average. Since 1950, factory and service employment

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[13] Testimony of Hon. Nicholas deB. Katzenbach, Attorney General of the United States, before Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, hearings, June 6-10, 13-16, 21, 22, 24 and 28, 1966. Part I, page 82.

[14] Testimony of Hon. Robert C. Weaver, Secretary of Housing and Urban Development, before Subcommittee on Housing and Urban Affairs, Senate Banking and Currency Committee on August 21, 1967.

has massively moved from the central cities to the suburbs. Because of inadequate transportation, more and more Negroes find themselves cut off by sheer distance from job opportunities.

Education

The American tradition of neighborhood schools concentrates the effect of housing segregation upon education. Segregated housing patterns and traditional neighborhood schools result in the ghetto child's being exposed only to other ghetto children, and receiving an education inferior to that offered in public schools outside the central city area. The bleak outlook of a ghetto child by virtue of his housing becomes even more dim when it is reinforced over and over again in segregated education of inferior quality.

The United States Commission on Civil Rights, in its 1967 report, *Racial Isolation in the Public Schools,* found that:

> "In large part, the separation of the racial and economic groups between cities and suburbs is attributable to housing policies and practices." (pp. 20-25).

The report concludes that school segregation has actually increased over the past 15 years (pp. 81-99), and that desegregation itself has a profound beneficial effect on the performance of students (pp.120-140).

Health

The segregated housing patterns which gave birth to the American urban ghetto also breed poor health.

A high incidence of tuberculosis, high infant mortality rates, and lower life expectancy mark the poor health which stalks the ghetto resident.

The Office of Economic Opportunity recently reported to the Congress that:[15]

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[15]Hearings before the House Committee on Education and Labor on the Economic Opportunity Act Amendments of 1967, Part 2, pages 854-855, June 19, 1967.

1. 50% of poor children have not had adequate immunization.
2. 64% of poor children have never seen a dentist.
3. 43% of all women who have babies in public hospitals have no prenatal care.
4. An infant born to poor parents has twice the risk of dying before reaching his first birthday.
5. The chance of dying before reaching the age of 35 is 4 times greater for the poor.
6. Poor families have:
   a. 3 times more disabling heart disease
   b. 7 times more visual impairment
   c. 5 times more mental illness, retardation, and nervous disorders.
7. Among the poor who are employed, one-third have chronic illness that severly limits their ability to work.

Law Enforcement

The urban ghetto – that inevitable end-result of segregated housing – is a fertile breeding-ground for crime. The hopelessness of the ghetto resident, the substandard environment in which he is trapped, make crime a too-inviting course of action.

One of the burning frustrations Negro residents carry with them in city ghettos is the knowledge that even if they want to and have the means to do so, very often they cannot get out. The white sections of the cities and the suburbs are, to a great extent, shut against them.

In its recent study on six northern cities, the Lemberg Center for the Study of Violence reports that the sense of being forced to live in the ghetto is one of the major causes of dissatisfaction, more widespread even than the discontent over the lack of jobs.[16] The report observes that frustration

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[16] "Six-city Study: A Survey of Racial Attitudes in Six Northern Cities: Preliminary Findings", Lemberg Center for the Study of Violence, Brandeis University, Waltham, Massachusetts, June, 1967, p. 8.

in these two areas – jobs and housing – "are directly perceived by Negroes as being significant causes of riots."

The riots and civil disturbances which plague our urban areas; the growing number of militant separatist movements; and the increasing alienation from the main stream of American life of many Negro Americans – all these have resulted in large part from segregated housing.

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In the last decade numerous states and localities have passed open housing laws, of varying degrees of effectiveness. 22 states now have such laws, including five – in Hawaii, Iowa, Maryland, Vermont and Washington – enacted in 1967. More than 80 counties and cities have also enacted open housing legislation.

Differing treatment of housing discrimination in adjacent municipalities can frequently lead to a complete stalemate, as in Milwaukee, Wisconsin. Milwaukee Negroes, living in a central city ghetto, are marching every night to support passage of a city open housing ordinance. The City refuses to pass such an ordinance until the surrounding suburbs have done so, fearing a flight of white citizens to the suburbs; many of the suburbs, having no Negro residents, feel that open housing is entirely a city problem. Thus, serious as the problem is, the Milwaukee area is bogged down by inaction. Nightly marches continue, and the entire community lives in the midst of severe racial tension.

Concluding that federal fair housing legislation was vital to give national vindication to the principle of equal opportunity, and to end the competition between states and localities to see who could delay longest in meeting the problem of housing discrimination, the Administration in 1966 recommended to the Congress a national open housing measure. The House passed such legislation in the summer of 1966, only to see it killed by a Senate filibuster later that year.

In 1967 the Senate Committee on Banking and Currency held hearings on the Administration's open housing bill, but deferred sending the measure to the floor because of apprehensions concerning the "climate" on the Senate floor. The bill's Senate sponsor, Senator Walter F. Mondale of Minnesota, remarked on the last day of the 1967 session that "in failing to come to grips with the problem of residential segregation and its attendant evils, Congress appears to be oblivious to what has been happening throughout the country."

In fact, Congress legislated a comprehensive fair housing act 102 years ago, in the Act of April 9, 1866, later codified in the Revised Statutes of 1873. It has never been repealed.[17] In the world of 1968, it has as firm a constitutional basis under the interstate commerce clause as would a law enacted in 1968. If Congress, told by the Supreme Court that it has had a valid fair housing law on the books for 102 years, wishes to amend or repeal it, it is open to Congress to follow its parliamentary processes to that end – an adventure which might run into the same obstacles of committee structure and filibuster which have prevented Congress from 1966 onward from enacting the open housing bill presently before it.

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[17] When Congress *wanted* to repeal a civil rights act, it had no difficulty doing so. Thus the Act of February 8, 1894 (28 Stat. 36) expressly repealed the protections for voting rights contained in the First and Second Enforcement Acts of 1870 - 1871. See "Freedom to the Free", U.S. Commission on Civil Rights (1963), p. 55.

And a Civil rights statute does not lapse into desuetude simply because it is old and unused. See *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100 (1953) (District of Columbia public accommodations law of 1872 upheld despite non-use); see also *Louisville and Nashville Railroad Co. v. United States*, 282 U.S. 740, 759 (1931); and *United States v. Morton Salt Co.*, 338 U.S. 632, 647, 648 (1950).

CONCLUSION

There were those in America who predicted chaos when Negro children were first allowed to be educated;[18] when this Court ruled that no State may deny to Negroes, solely because of their race, the right to sit on a jury, or to vote, or to work for a living; when this Court forbade States to engage in racial zoning and outlawed Jim Crow laws in interstate travel, in schools, in recreation places, in courtrooms and in other public places; and, in fact, whenever the Negro made any advance toward first-class citizenship. Their fears have turned out to be fantasies.

So long as residential segregation remains characteristic of urban America – so long as green money in a black hand cannot buy the same kind of housing that green money in a white hand can buy – racial discrimination will pervade every facet of life – homes, jobs, schools, health, the law.

The unfortunate truth is that segregated and unequal housing will not disappear overnight. The backlog of deficiency, the habits of people, the accumulated patterns of residential segregation, the large financial needs of a depressed people will remain as substantial obstacles to full desegregation of our cities.

But we must move ahead. Urban America cannot longer tolerate the crisis of the ghetto. It is now time to stop the cancerous growth of racial residential segregation.

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[18] DuBois, W. E. B., *Souls of Black Folk* (1903), p. 32.

The provisions of the Constitution and the Congressional statutes cited in this Brief provide adequate basis for judicial enforcement of the human right to fair housing.

Respectfully submitted.

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January 15, 1968
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SUPREME COURT, U. S.

JAN 18 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, *Petitioners*

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations, *Respondents*

On Petition for Certiorari From the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE, URGING REVERSAL ON BEHALF OF—

THE NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE;
GEORGE J. GOTTWALD, Administrator, Archdiocese of St. Louis;
LAWRENCE CARDINAL SHEHAN, Archbishop of Baltimore;
PATRICK CARDINAL O'BOYLE, Archbishop of Washington, D.C.;
FLOYD L. BEGIN, Bishop of Oakland;
WILLIAM G. CONNARE, Bishop of Greensburg;
HUGH A. DONOHOE, Bishop of Stockton;
JOHN A. DONOVAN, Bishop of Toledo;

(See inside cover for counsel)

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TEXTS:

ANTIEAU, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clauses of Article Four, 2 W.&M.L.R. 1 (1967) 17
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, *Petitioners*

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations, *Respondents*

On Petition for Certiorari From the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE.* URGING REVERSAL. ON BEHALF OF—

THE NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE;
GEORGE J. GOTTWALD, Administrator, Archdiocese of St. Louis;
LAWRENCE CARDINAL SHEHAN, Archbishop of Baltimore;
PATRICK CARDINAL O'BOYLE, Archbishop of Washington, D.C.;
FLOYD L. BEGIN, Bishop of Oakland;

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* Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of Respondents' counsel to the filing of this Brief Amicus Curiae.

WILLIAM G. CONNARE, Bishop of Greensburg;
HUGH A. DONOHOE, Bishop of Stockton;
JOHN A. DONOVAN, Bishop of Toledo;
JOSEPH A. DURICK, Administrator, Diocese of Nashville;
RAYMOND J. GALLAGHER, Bishop of Lafayette-in-Indiana;
PAUL J. HALLINAN, Archbishop of Atlanta;
CHARLES H. HELMSING, Bishop of Kansas City-St. Joseph;
JOSEPH H. HODGES, Bishop of Wheeling;
ROBERT E. LUCEY, Archbishop of San Antonio;
JOHN J. MAGUIRE, Administrator, Archdiocese of New York;
JOSEPH M. MARLING, Bishop of Jefferson City;
JOSEPH McSHEA, Bishop of Allentown;
RUSSELL J. McVINNEY, Bishop of Providence;
JOHN L. MORKOVSKY, Administrator, Diocese of Galveston-Houston;
VICTOR J. REED, Bishop of Oklahoma City and Tulsa;
JOHN J. RUSSELL, Bishop of Richmond;
FULTON J. SHEEN, Bishop of Rochester;
IGNATIUS J. STRECKER, Bishop of Springfield-Cape Girardeau;
ERNEST L. UNTERKOEFLER, Bishop of Charleston; and
JOHN J. WRIGHT, Bishop of Pittsburgh.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of The National Catholic Conference for Interracial Justice and the following Roman Catholic bishops:

George J. Gottwald, Administrator, Archdiocese of St. Louis, Missouri;

Lawrence Cardinal Shehan, Archbishop of Baltimore, Maryland;

Patrick Cardinal O'Boyle, Archbishop of Washington, D.C.;

Floyd L. Begin, Bishop of Oakland, California;

William G. Connare, Bishop of Greesburg, Pennsylvania;

Hugh A. Donohoe, Bishop of Stockton, California;

John A. Donovan, Bishop of Toledo, Ohio;

Joseph A. Durick, Administrator, Diocese of Nashville, Tennessee;

Raymond J. Gallagher, Bishop of Lafayette-in-Indiana;

Paul J. Hallinan, Archbishop of Atlanta, Georgia;

Charles H. Helmsing, Bishop of Kansas City-St. Joseph, Missouri;

Joseph H. Hodges, Bishop of Wheeling, West Virginia;

Robert E. Lucey, Archbishop of San Antonio, Texas;

John J. Maguire, Administrator, Archdiocese of New York;

Joseph M. Marling, Bishop of Jefferson City, Missouri;

Joseph McShea, Bishop of Allentown, Pennsylvania;

Russell J. McVinney, Bishop of Providence, Rhode Island;

John L. Morkovsky, Administrator, Diocese of Galveston-Houston, Texas;

Victor J. Reed, Bishop of Oklahoma City and Tulsa, Oklahoma;

John J. Russell, Bishop of Richmond, Virginia;

Fulton J. Sheen, Bishop of Rochester, New York;

Ignatius J. Strecker, Bishop of Springfield-Cape Girardeau, Missouri;

Ernest L. Unterkoefler, Bishop of Charleston, South Carolina; and

John J. Wright, Bishop of Pittsburgh, Pennsylvania.

The National Catholic Conference for Interracial Justice, a non-profit corporation, was organized in 1960, and is an agency which serves nearly 150 human relations and urban organizations throughout the United States. The Conference works to end racial discrimination and prejudice, and to foster interracial justice in all areas of life.

The individuals are bishops of the Roman Catholic Church. As pastors of their respective dioceses, they are committed to the proposition that "with regard to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent." (Vatican Council II, *Pastoral Constitution on the Church in the Modern World.*)

SUMMARY STATEMENT OF THE CASE

Petitioners Joseph Lee Jones and Barbara Jo Jones, husband and wife, citizens of the United States and of the State of Missouri, in June, 1965, were looking for a new home and, responding to an advertisement in the *St. Louis Post-Dispatch,* went to Paddock Woods, a real estate subdivision, owned and developed by respondents. Petitioners determined that a certain style of house suited their needs and resources and was reasonably accessible to their places of employment as federal employees. They selected a house and lot in Paddock Woods which they then sought to purchase from respondents. The respondents refused to sell them the house and lot because Joseph Lee Jones is a Negro, and because it is the respondents' policy not to sell the said houses and lots to Negroes. The record does not disclose the existence of any state or local "open housing" statute or ordinance.

Paddock Woods is projected as a large suburban community. While respondents have not been the recipients of state or federal grants, loans or other monetary assistance in establishing this community, the Paddock Woods development is nevertheless clothed with the following incidents of municipal character:

a. Developers, the respondents, enjoy the privileges and protections of various state and local laws (*e.g.*, incorporation, licensing, etc.)

b. They are required to render effective on a community-wide basis, numerous state and local laws (*e.g.*, zoning ordinances, building codes, etc.)

c. They afford a number of municipal services and facilities (*e.g.*, streets, access to utilities, golf course).

Petitioners brought an action in the United States District Court for the Eastern District of Missouri, to recover damages and for injunctive relief. The District Court entered judgment denying the relief sought, 255 F. Supp. 115, and petitioners appealed. The United States Court of Appeals for the Eighth Circuit on June 26, 1967, affirmed, holding that the respondent owners of homes in Paddock Woods, which were on the market for sale and which were built without federal or state monetary assistance, were not precluded by civil rights statutes or by the Thirteenth or Fourteenth Amendments to the federal constitution from refusing to sell a home to a person, willing and able to buy the same, on the ground that such person is a Negro. 379 F. 2d 33. Petitioners then prayed that the Supreme Court of the United States issue a writ of certiorari to United States Court of Appeals for the Eighth Circuit to review its said judgment.

The petition for certiorari was granted December 4, 1967.

The *amici curiae* submitting this brief concur in the arguments presented by petitioners to this Court, arguing in particular that this case should be held governed by the provisions of Section 1982 of Title 42, of the Civil Rights Act of 1866. It is the belief of the *amici* that petitioners' brief deals adequately both with that issue and with the alternative issue of whether there was "state action", in the premises, entitling petitioners validly to assert a denial of equal protection of the laws under the Fourteenth Amendment.

The special purpose which the *amici* believe that their brief may serve is to present argument that there is a constitutional right to purchase a home without discrimination on account of race, such right being grounded not upon social convenience but upon antecedent moral rights deriving from the nature of man. Representing religious leadership of one religious body in the American community, the *amici* seek to stress teaching of their Church relating to these moral rights.

ADDITIONAL QUESTIONS PRESENTED

The *amici curiae* desire to bring to the attention of this Court the following four questions:

1. Whether freedom to purchase a home without discrimination on account of race is a liberty guaranteed by the due process clause of the Fourteenth Amendment.
2. Whether freedom to purchase a home without discrimination on account of race is a fundamental right of citizens guaranteed by the privileges and immunities clauses of Article Four of the Fourteenth Amendment.

3. Whether freedom to purchase a home without discrimination on account of race is a fundamental right within the meaning of the Ninth Amendment.

4. Whether freedom to purchase a home without discrimination on account of race is protected under the Thirteenth Amendment.

Common to each of these questions is the issue of whether such freedom of purchase is, or should in this day, be recognized to be, a fundamental, or "natural" *, right belonging to petitioners as human beings. become "the slave of society." 39th Cong., 1st Sess.

ARGUMENT

I. Freedom To Purchase a Home Without Discrimination on Account of Race Is a Natural or Human Right.

1. Racial isolation in the American community. The increasingly marked insistence by religious leaders upon what they say is the "injustice" or "immorality" of racial isolation in housing is not an abstraction but is a moral judgment deriving from observation of actual conditions in our society. The effect of such isolation may be seen (a) in terms of the personal lives of the isolated (b) in terms of the community. Racial segregation in dwelling, whether maintained by law or by commercial or other widespread private practice, becomes a community problem because of its intensive impact upon individual lives. In the most intimate area of human existence—the daily living that goes

* As will appear, the term, "natural", herein is not meant to import the individualistic "natural law" concepts found in Locke, the *laissez faire* "natural law" of Adam Smith, or the "natural law" of those who argue that racial segregation derives "naturally" from racial differences found in the order of creation.

on in one's place of dwelling—crowdedness[1] in characteristically poor quality housing,[2] and such factors as hazard to health[3], lack of privacy, danger to family life[4], and high incidence of crime and juvenile delinquency[5] today work extreme personal hardship upon millons of citizens who are confined *de facto* to racial compounds. Inseparably connected with the racial enclaves found in all large American cities is the perpetuation of poverty through severe restriction in job opportunity[6] and of ignorance and non-achievement through severe restriction in educational opportunity[7]. Perhaps the chief evil effect upon individuals of publicly or privately maintained racial isolation in housing are the outlooks on self and society which it, along with

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[1] See Map 2, showing percent distribution of Negro population of St. Louis by census tract, 1950, in I RACIAL ISOLATION IN THE PUBLIC SCHOOLS (report of U.S. Commission on Civil Rights) 33 (1965).

[2] MCINTIRE, RESIDENCE AND RACE 155 (1960).

[3] In 1965 the national white maternal death rate was 21.0%. while that for non-whites was 83.7%; the fetal death rate for whites was 13.9%, while that for non-whites was 27.2%; the infant death rate for whites was 21.5%, while that for non-whites was 40.3%. STATISTICAL ABSTRACT, U.S., 1967, Sept. (Bureau of Census, Department of Commerce, 88th ed. (1967)). The rate of tuberculosis for whites in 1963 was 3.4%, while that of non-whites was 12.6%. HEALTH, EDUCATION, AND WELFARE INDICATORS, Feb.-Oct., 1965, 20.

[4] See generally MOYNIHAN, THE NEGRO FAMILY—THE CASE FOR NATIONAL ACTION (Office of Policy Planning and Research, U.S. Department of Labor (1966)).

[5] See generally, WOLFGANG, CRIME AND RACE (1964).

[6] See, IN SEARCH OF HOUSING, A STUDY OF EXPERIENCE OF NEGRO PROFESSIONAL AND TECHNICAL PERSONNEL IN NEW YORK STATE (1959).

[7] See, Report of Commission on Race and Housing, WHERE SHALL WE LIVE? 35, 36 (1958) and see, generally, I, II, RACIAL ISOLATION IN PUBLIC SCHOOLS (report of U.S. Commission on Civil Rights) (1965).

the foregoing intimately related factors, helps to generate: the sense of limited alternatives, helplessness, deprivation and insecurity common to the poor[8]. But in addition other attitudes—alienation, frustration and outrage, due peculiarly to the fact that the combination of afflictions is visited by others upon such individuals solely because of race—are inevitable.[9]

> "Discrimination . . . is the humiliation, frustration, and embarrassment that a person must feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues." [10]

Racial segregation in housing is an illness affecting the entire American community. The crime which is

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[8] "In our society, a continuously low income is directly associated with certain life situations. Poorer, more crowded living quarters, reduced access to education and recreation, occupational restriction to simpler, manual types of work—these and similar characteristics of the very poor are sufficiently obvious to need no underlining. The result of these circumstances is a set of life conditions which is not so obvious. They consist of four general limitations: (1) comparative simplification of the experience world (2) powerlessness (3) deprivation, and (4) insecurity." IRELAN, LOW-INCOME LIFE STYLES (Welfare Administration Publication No. 14; U.S. Department of Health, Education, and Welfare) 1-2 (1966).

[9] That most housing discrimination in the United States is the result of racial discrimination appears open to little argument. The study of the Taeubers, NEGROES IN CITIES (1965) brings this point out clearly.

[10] Per Goldberg, J., concurring in Heart of Atlanta Motel v. United States, 379 U.S. 291-292 (1964), quoting Senate Report No. 872, 88 Cong., 2d Sess., 16.

nurtured by the racial compound becomes a bludgeon directed at the head of the whole community[11], and the mounting costs of court and correctional services divert public funds from uses in relief of poverty and ignorance into which they might otherwise be plowed. Failures of ghetto people in economic, family and civic life rot the entire social fabric[12]. But the greatest public harm which results from such segregation is that it is a direct and active negation of the idea of society itself, *i.e.*, a society of human persons[13].

2. The right here involved. If racial segregation in housing is damaging to human persons as human persons and to the society which they comprise, it may be surmised that practices which promote or maintain such segregation are violative of basic human right. While the freedom of purchase in question should be deemed self evident, the record of a century's conflict

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[11] See, generally, A TIME TO LISTEN AND A TIME TO ACT (United States Commission on Civil Rights, 1967).

[12] See, CLARK, PREJUDICE AND YOUR CHILD (1955); U.S. Commission on Civil Rights, *1959 Report* 391, 392.

[13] "And the commonwealth, in so far as it deserves the name, is a society of persons . . . Society is a whole whose parts are themselves wholes, and it is an organism composed of liberties, not just vegetative cells. It has its own good and the work of the individuals who constitute it. But this good and this work are and must be essentially *human*, and consequently become perverted if they do not contribute to the development and improvement of human persons.

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[The common good] is the good human life of the multitude, of a multitude of persons . . . The common good of society is their communion in the good life; it is therefore common *to the whole and to the parts*, to the parts, which are in themselves wholes, since the very notion of persons means totality." MARITIAN, THE RIGHTS OF MAN AND NATURAL LAW, 6-9 (1943).

respecting it invokes the need to discuss the nature of man and of property, and to relate such discussion to the freedom to purchase a home.

The Declaration of Independence speaks of man's endowment with the "unalienable" rights of life, liberty and the pursuit of happiness, thus establishing rights as inherent in the nature of man rather than as dependent upon social convenience (*e.g.,* improvement in the quality of the labor force) or as related solely to a particular benefit to an individual but not clearly related to his whole nature as man (*e.g.,* improvement in his learning skill). It is submitted that Christian teaching roots the freedom to purchase a home in firmer soil because of its expansive view of the nature and dignity of man and its view of rights of property not as autonomous but as always linked to man-in-society. In Christian teaching the human person has an *absolute* worth because created by, and intended for, God[14]. Out of this fact flow his rights and obligations[15]. In contemporary Catholic teaching, means which are suitable for the proper development of life are among such rights, including the right to shelter:

> "Beginning our discussion of the rights of man, we see that every man has the right to life, to bodily integrity, and to the means which are suitable for the proper development of life; these are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services." [16]

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[14] *Id.* at 4.

[15] PACEM IN TERRIS (encyclical of Pope John XXIII) 10 CATHOLIC LAW. 29 (1964).

[16] *Ibid.*

The encyclical, *Pacem in Terris,* relates the social and economic progress of citizens to housing[17] and to the individual's "right to freedom of movement and of residence within the confines of his own country."[18] It specifies related rights, such as the right to set up a family[19] and the right to an opportunity to work[20], both such rights being obviously related to housing. The encyclical, *Mater et Magistra,* likewise describes a "right" to housing[21].

Such broadly stated "right" is not in conflict with the right to property, as seen in Catholic teaching:

> "The right to private property, even of productive goods, also derives from the nature of man. This right, as We have elsewhere declared, *is an effective means for safeguarding the dignity of the human person and for the exercise of responsibility in all fields; it strengthens and gives serenity to family life, thereby increasing the peace and prosperity of the State."*[22] (Emphasis in original text.)

Again,

> "Private property . . . is a natural right possessed by all, which the State may by no means suppress. However, as there is from nature a social aspect to private property, he who uses his

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[17] *Id.* at 38.

[18] *Id.* at 32.

[19] *Id.* at 30.

[20] *Id.* at 31.

[21] MATER ET MAGISTRA (encyclical of Pope John XIII, America Press ed., 1961).

[22] PACEM IN TERRIS, *ibid.*, at 31.

> right in this regard must take into account not merely his own welfare but that of others as well." [23]

From this it follows that both the rights of acquisition and of disposal of property are limited by considerations of the "welfare of others" and "safeguarding the dignity of the human person." American and English law have long emphasized the rights to acquire and to alienate property as basic liberties[24]. It has also long recognized that these rights are not absolute. What our law needs now to make clear is that, whatever freedoms and limitations otherwise inhere in the property right, neither the right to acquire or to dispose of property may be made to depend upon the race of the buyer or the seller, since the imposition of such a test is harmful to the "welfare of others" and destructive of "the dignity of the human person". Stated differently, the right is fundamental and complete, being limited only by factors reasonably demanded by the common good. Since, as has been seen, the common good is harmed, rather than advanced, through racial discrimination in the sale of housing, respondents' rights in selling ought to be deemed limited by the fact that they may not discriminate as to race, while the record shows no countervailing factor in the name of the common good which should be deemed to limit petitioner's right of purchase. (Whether such right is constitutionally protectable or guaranteed is discussed *infra.*)

That a racial test is inadmissible to determine who shall be able to purchase a home, because placing an

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[23] MATER ET MAGISTRA, *ibid.*, at 8.

[24] Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1793).

arbitrary limitation upon a human right, has long been the moral judgment of religious leaders of all faiths[25].

II. The Right To Purchase a Home Without Discrimination on Account of Race Is a Liberty Protectable Under the Due Process of the Fourteenth Amendment.

While reversal in favor of petitioners in this case may be based upon a finding of state action in the premises giving rise to operation of the equal protection clause, or even, as petitioners have also argued, with or without state action, upon a determination that Section 1982 of Title 42 of the Civil Rights Act of 1866, as reenacted in the Civil Rights Act of 1870, is a valid exercise of the power of Congress under Section 5 of the Fourteenth Amendment, it is believed that the Fourteenth Amendment provides another, even more obvious ground for reversal. That ground is that the refusal of respondents to sell to the petitioners constitutes a deprivation of liberty to the latter without due process of law. This ground appears valid even in the absence of applicable Congressional enforcement legislation.

1. It cannot be doubted that petitioners have been deprived of a "liberty" as that term is popularly un-

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[25] The Catholic bishops of the United States, in a series of statements over the past quarter century, have condemned all forms of racial discrimination, including discrimination in housing. See, their corporate statements of November 11, 1942, ON VICTORY AND PEACE; November 11, 1943, ESSENTIALS OF A GOOD PEACE; November 13, 1958, DISCRIMINATION AND THE CHRISTIAN CONSCIENCE ("But discrimination based on the accidental fact of race or color, and as such injurious to human rights . . . cannot be reconciled with the truth that God has created all men with equal rights and equal dignity"; August 20, 1963, RACIAL HARMONY, November 17, 1963, BONDS OF UNION.

derstood and indeed of a liberty which, as noted *supra,* may be deemed fundamental. This Court has said:

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

Shelley v. *Kraemer,* 334 U.S. 1, 10 (1948). In other recent decisions this Court has strikingly recognized that a civil right is denied when persons are excluded, on account of their race, from the enjoyment of property. *Evans* v. *Newton,* 382 U.S. 296 (1966). In *Bolling* v. *Sharpe,* 347 U.S. 497 (1954) this Court held that racial segregation in public schools deprived the segregated Negro children there involved of liberty without due process of law under the Fourteenth Amendment. "Liberty under law," said the Court per Warren, C.J., "extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." 347 U.S. 497, 499. Denial of equal housing opportunity on account of race cannot be classified as any less a denial of liberty than denial of equal educational opportunity on account of race. If it be conceded *arguendo* that the deprivation of liberty in the instant case was caused by private action rather than by state action, the magnitude of the deprivation is in no wise lessened by that fact.

2. The lack of specific enforcement legislation should not be deemed fatal to Petitioners' claim of right under the due process clause. It is the duty of government

to afford protection of rights. *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), and the courts have power to apply principles of equity for the protection of rights where legislative expression is lacking. *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 740 (1944). For the same reason, equitable protection in the absence of statute could be afforded here even if solely private action were determined to exist, since the due process clause, while specifically condemning certain state action, is also declarative of rights which a court of equity should recognize and enforce.

3. Were this Court to declare that the right to purchase a home without discrimination as to race is a liberty protectable under the Fourteenth Amendment due process clause, it would provide a needed recognition of the nature of the right. This Court in *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) said that equal protection of the laws is "a more explicit safeguard of prohibited unfairness than 'due process of law' ", adding to that these words: "But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Thus this Court appeared to indicate in that case (involving racial discrimination in schooling) that the due process clause is properly invoked to protect against those discriminations which most offend the sense of justice by attacking the most fundamental of liberties. Application of the due process clause as the governing constitutional principle in this case, or as stating the equitable basis for relief of petitioners, would constitute the most emphatic recognition, in this day and place of the painful emergence of a whole people from an original condition of slavery, that racial discrimination in housing is an intolerable denial of fundamental justice.

III. Freedom To Purchase a Home Without Discrimination on Account of Race Is a Fundamental Right of Citizens Guaranteed by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment.

Assuming that the right to purchase a home without discrimination as to race is a fundamental right, it is a right protected by the privileges and immunities clauses of the Fourth Article and the Fourteenth Amendment. In *Campbell* v. *Morris,* 3 Harr. & McHen. 535 (1797), one of the earliest interpretations of the privileges and immunities clause of Article IV, the Court of Appeals of Maryland held it to protect "personal rights", among these, the right to acquire property. In *Corfield* v. *Coryell,* 4 Wash. C.C. 371 (1825) the court stated that the term, "privileges and immunities of citizens of the several states", refers to those privileges and immunities 'which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." Among these the court listed "the right to acquire and possess property of every kind." This original meaning of this clause became effaced in *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1868), in which the Supreme Court held that its guarantee was limited to those privileges and immunities which are accorded the citizens of a state into which one might go. It has been stated that this "triumph of parochialism over humanitarianism", as well as the long continuing disregard by slave-holding states of the "fundamental human right" meaning of the privileges and immunities clause of Article IV, was a prime factor leading to the adoption of the privileges and immunities clause of the Fourteenth Amendment[26].

[26] For support of the "fundamental right" concept of the clauses see Antieau, PAUL'S PERVERTED PRIVILEGES OR THE TRUE MEANING OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE FOUR, 9 W. & M.L.R. 1 (1967).

It is submitted that the two clauses should be deemed identical in what they are intended to protect, and that no sound reason exists upon which to base an interpretation of either as not reaching fundamental human rights the protection of which was the original intendment of the privileges and immunities concept.

IV. Freedom To Purchase a House Without Discrimination on Account of Race Is a Fundamental Right Within the Meaning of the Ninth Amendment.

This Court has recognized liberties nowhere specifically enumerated in the Constitution. Recent among these have been rights of privacy[27] and of travel[28]. As Justice Goldberg (joined by Chief Justice Warren and Justice Brennan), in his concurring opinion in *Griswold* v. *Connecticut,* stated:

> ". . . [T]he Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."

Griswold v. *Connecticut,* 381 U.S. 479, 493 (1965).

Should this Court conclude that, for one reason or another, the bases for relief of petitioners elsewhere set forth in this and in the petitioners' brief are un-

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[27] Griswold v. Connecticut, 381 U.S. 479 (1965).

[28] Kent v. Dulles, 357 U.S. 116 (1958).

acceptable, relief should be deemed open to them through the gateway of the Ninth Amendment. A fundamental right is plainly here involved, one not specifically "enumerated" in the Constitution and one undeniably "retained by the people."

V. The Freedom To Purchase a Home Without Discrimination on Account of Race Is Protected Under the Thirteenth Amendment.

The Thirteenth Amendment states that neither slavery nor involuntary servitude shall exist within the United States. This reaches both governmental conduct and private conduct. *Clyatt* v. *United States,* 197 U.S. 207 (1904). Whereas, implementing legislation exists in Section 1982 of Title 42 of the Civil Rights Act of 1866, none is needed since the ban of the Amendment is self-executing. *Civil Rights Cases,* 109 U.S. 3, 20, 23 (1883).

In *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) the Thirteenth Amendment was construed to abolish solely bondage, or enforced personal service, and not "separate but equal" travel accommodations for Negroes and whites. The majority opinion in that case stated that "a statute which implies merely a legal distinction between the white and colored races . . . cannot be justly regarded as imposing any badge of slavery or servitude . . ." *Id.* at 541. The Court then, in turning to discussion of the Fourteenth Amendment, expanded upon what it considered reasonable legal distinctions between the white and colored races: among these, the then existing, widely accepted miscegenation laws and racial segregation in education. Just as the "separate but equal" doctrine of *Plessy* has now been rejected by this Court *Brown* v. *Board of Education,* 347 U.S. 483

(1954), so ought its narrow definition of "slavery", as that term is employed in the Thirteenth Amendment.

The Court was not unanimous in *Plessy* v. *Ferguson,* Justice Harlan, in dissent, saying:

> "The 13th Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institutions of slavery as previously existing in the United States, *but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude."* (Emphasis supplied.)

163 U.S. 537, 555. This view of Justice Harlan finds ample support in the legislative history of the Thirteenth Amendment. In the debate over the Freedmen's Bureau Bill (which was intended to enforce the Thirteenth Amendment), Senator Trumbull, prime sponsor both of the bill and of the Thirteenth Amendment, said that the Amendment reached beyond the precise condition of bondage known as slavery:

> "With the destruction of slavery necessarily follows the destruction of the incidents to slavery.
>
> . . .
>
> "Those laws that prevented the colored man going from home, that did not allow him to buy or sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery."

39th Cong., 1st Sess. (Jan. 19, 1866) S. p. 322. Trumbull added:

> "I have no doubt that under this provision of the Constitution we may destroy all these vestiges of discriminations in civil rights against the black man. . ."

Ibid. Senator Howard, in the debate on 1866 Civil Rights Bill (based upon the Thirteenth Amendment) stated that the Amendment reached "the right or privilege of earning and purchasing property." 39th Cong., 1st Sess. (Jan. 20, 1866) S. p. 504. Trumbull quoted Carl Schurz as warning that abolition of slavery (in the narrow sense) would be rendered meaningless if the freedman, due to continued discriminations, were to become "the salve of society." 39th Cong., 1st Sess. (Feb. 1, 1866) H. p. 589. One notable form of discrimination imposed under the post-bellum Black Codes was discrimination in housing, several Southern state laws prohibiting Negroes from buying or leasing homes.[29] The Civil Rights Act of 1866 constituted recognition by the Congress that such discrimination is inherently part of the term, "slavery", as that term is employed in the Thirteenth Amendment.[30]

The *amici curiae* submit that the narrow interpretation of "slavery", as given in *Plessy* v. *Ferguson,* should now be abandoned for the broad interpretation of the term as undoubtedly comprehended by the framers of the Thirteenth Amendment and as expressed by Justice Harlan. Certainly, no other description of racial discrimination (whether public or private) in housing is as accurate as the description of it as a "badge of slavery." The great bulk of this discrimination in the United States has had no other origin than

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[29] See remarks of Representative Windom, 39th Cong., 1st Sess., March 2, 1866, H. p. 1159.

[30] In United States v. Morris, 125 F. 322 (1903), it was held that Congress has the power, by virtue of the Thirteenth Amendment, to protect citizens in "the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of those privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that Amendment." 125 F. 322, 330.

an origin in the institution of slavery, while the color of skin as the visible sign denominating who was free and who was slave continues to this hour as the visible sign all too frequently denominating who may purchase a home and who may not.

In urging this interpretation, the *amici curiae* again stress the fundamental right here involved and the necessity today for the fullest vindication of the dignity of human person, freed of every badge, incident or vestige of slavery.

CONCLUSION

It is submitted that the decision of the United States Court of Appeals for the Eighth Circuit was in error and that this Court should reverse the judgment below.

Respectfully submitted,

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January 1968

SUPREME COURT, U. S.
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JOHN F. DAVIS, CL

No. 645.

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OCTOBER TERM, 1967.

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a Corporation, ALFRED REALTY COMPANY, a Corporation, PADDOCK COUNTRY CLUB, INC., a Corporation, ALFRED H. MAYER, an Individual, and an Officer of the Above Corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the Court of Appeals (Printed at A. 50a et seq.), is reported at 379 F. 2d 33. The memorandum opinion of the District Court for the Eastern District of Missouri is reported at 225 F. Supp. 115 (Printed at A. 18a et seq.).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 26, 1967. The petition for writ of certiorari was filed on September 22, 1967, and granted on December 4, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitution.

Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.

Article IV, Section 2, Clause 1.

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.

Article IV, Section 2, Clause 3.

> No person held to Service or Labour in one state, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service or Labour may be due.

Article IV, Section 4.

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive

(when the Legislature cannot be convened), against domestic violence.

Amendment XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutes.

The Civil Rights Act of 1866, Act of April 9, 1866, Ch. 31, 14 Stat. 27, codified in Title 42 U. S. C., Secs. 1981 and 1982—set forth at Appendix p. 57 and p. 64.

Sec. 18 of the Enforcement Act of May 31, 1870, Ch. 114, 16 Stat. 144, codified in Title 42 U. S. C., Secs. 1981 and 1982—set forth at Appendix p. 63 and p. 64.

Sec. 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871, Ch. 22, 17 Stat. 13, codified in Title 42 U. S. C., Sec. 1983—set forth at Appendix p. 63 and p. 65.

QUESTIONS PRESENTED.

1. Whether the refusal to sell a lot and house, otherwise on the market, solely because of the race of the prospective buyer is prohibited by the Civil Rights Act of 1866, or its re-enactment in 1870.

2. Whether the Civil Rights Act of 1866 was validly enacted by Congress under authority granted by the Constitution.

3. Whether, regardless of statute, the state has sufficiently involved itself in the alleged discriminatory refusal to sell so as to make said refusal unlawful; by acts such as licensing, zoning, regulating, and otherwise promoting and assisting the subdivision development; by its delegation of municipal function to the developers; or by a combination of these factors.

STATEMENT OF THE CASE.

This case was filed in the United States District Court for the Eastern District of Missouri seeking relief under the Civil Rights Acts of 1866, 1870 and and 1871, codified in 42 U. S. C., Secs. 1981, 1982 and 1983, and under the Thirteenth and Fourteenth Amendments to the Constitution directly.

Inasmuch as this case arises from the affirmance by the Court of Appeals (A. 42a), of the order of the District Court sustaining the Respondents' motion to dismiss Petitioners' first amended complaint for failure to state a claim upon which relief could be granted (A. 14a), the facts pleaded by Petitioners in their first amended complaint (A. 3a-13a), must be taken as true.

Petitioners Joseph Lee Jones and Barbara Jo Jones are husband and wife who, in June of 1965, in consequence of an advertisement in the St. Louis Post-Dispatch, went to a subdivision known as Paddock Woods in St. Louis County, Missouri, in order to consider the purchase of a lot and home. After inspecting the display houses, Petitioners decided that a particular type of home was well suited to their personal needs, convenient to their places of employment with agencies of the Government of the United States, and within their financial range (A. 6a).

Paddock Woods is a subdivision, owned and developed by the Alfred H. Mayer Company, a corporation engaged in the business of developing subdivisions in St. Louis County, including, not only Paddock Woods, but neighboring subdivisions known as Paddock Estates, Paddock Meadows and Wedgewood. Alfred Realty Company is a corporation licensed as a real estate broker by the State of Missouri which is the exclusive sales agent for the

homes in these subdivisions. Alfred H. Mayer, also licensed as a real estate broker by the State of Missouri, owns a controlling interest in and is the managing officer and guiding policy maker of both Alfred H. Mayer Company and Alfred Realty Company. Paddock Country Club, Inc., the other Respondent, is a corporation controlled by the other Respondents, which operates a golf course for the use of residents of the said "Mayer" subdivisions (A. 3a-5a). The Respondents will sometimes be referred to hereafter simply as "the developers".

After Petitioners Joseph and Barbara Jones had picked out a lot and home in Paddock Woods which they wished to order and purchase, the Respondents refused to sell them the house and lot because of the fact that Joseph Jones is a Negro, and because it is the Respondents' general policy not to sell said houses and lots to Negroes (A. 7a).

The governmental connections of the State of Missouri, its political subdivisions, and their various agencies with respondents and their housing subdivisions here involved are detailed in paragraphs 7 and 8 of the first amended complaint (A. 7a-12a). The allegations therein show a multiple panoply of state action. Not only are the Respondents themselves incorporated and licensed by the State of Missouri, but they also use the services of other state licensees, and of state and municipal offices, including the Building Commission, the Planning Commission, the Recorder of Deeds, the Metropolitan St. Louis Sewer District, the County Engineer and the Highway Department (A. 7a-8a).

In addition the developers use the services of state chartered lending institutions, title companies, surveyors and architects, and even go so far as to co-advertise with local public utilities such as the gas and electric companies (A. 8a-9a).

It is also alleged that the developers have been granted the right to build and regulate the small community of Paddock Woods (and the larger community including the adjacent "Mayer" subdivisions), just as if they were a political subdivision of the State of Missouri. In addition to completely governing the community during the construction stages, the developers retain a large degree of regulatory power thereafter, by means of restrictive covenants. A Board of Trustees appointed by the developers, in fact, has the power to levy assessments against the residents for community-wide services and maintenance of community facilities and areas, and to enforce them through liens and court proceedings (A. 9a-11a).

SUMMARY OF ARGUMENT.

1. The Civil Rights Act of 1866, 14 Stat. 27, by its plain meaning, creates the right for Negroes to purchase or lease any housing available on the market without discrimination based on race. The provision that "all persons . . . shall have the same right . . . to purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white citizens" applies to individual sellers or lessors of residential property, who must, under its terms, make this property available without racial discrimination. The argument that this statute was intended merely to nullify "black codes" or other laws authorizing discrimination fails to take into account that such laws were nullified anyway by constitutional provision, and by other language within the statute itself providing, "all persons shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens".

2. The legislative history of this statute, which was passed in March, 1866, re-enacted over the veto of the first President Johnson on April 9, 1866, and finally re-enacted again on May 31, 1870, after the ratification of the Fourteenth Amendment, clearly shows the intent to recognize or create the national federal right to obtain residential property without discrimination, regardless of state interference or state non-interference. The Civil Rights Act of 1866 was enacted at first solely under the power given Congress by the Thirteenth Amendment to remove the incidents of slavery. The Thirteenth Amendment was enacted to remove all discrimination in basic rights, which discrimination existed throughout the nation and had been given the authority of law by **Scott v. Sandford**, 19 How. 393 (1857), which held that even free Negroes were not entitled to the rights of citizens.

Although the statute was re-enacted after the ratification of the Fourteenth Amendment, Congress did not intend by this re-enactment, to limit the scope of the Act. If it had so intended it would have used limiting language. The holding of the court below that the re-enactment of this law, has somehow tainted it with a "state action" limitation does violence to the intentions of Congress and to prior decisions of this Court, recognizing that the law could stand on the Thirteenth Amendment alone.

3. The Civil Rights Act of 1866 can also be sustained under the Fourteenth Amendment. The opinions of this Court in **United States v. Guest**, 383 U. S. 745 (1966), and **Katzenbach v. Morgan**, 384 U. S. 641 (1966), indicate that the broad powers of Congress granted under Sec. V of the Fourteenth Amendment will no longer be limited by the **Civil Rights Cases**, 109 U. S. 3 (1883). That clause of first section of the Fourteenth Amendment which provides "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws", was intended to prevent individual discrimination authorized by the silence of the states as well as that discrimination directly fostered by the state. This language was directed to "no state" not because the framers doubted that Congress had the power to prohibit individual discrimination, but because it was doubted whether Congress could prohibit positive state discrimination. Under **McCulloch v. Maryland**, 4 Wheat. 316, 421 (1819), and **Prigg v. Pennsylvania**, 16 Pet. 539 (1842), there was no doubt that Congress could prohibit individual denial of constitutional rights by "private action" alone, but because of the Tenth Amendment, the framers wanted to make sure that in addition, no state could authorize such discrimination by its laws under the police power. By language which is directed not to affirmative state action, but to denial by the state of equal protection the framers of the Fourteenth

Amendment intended to protect against the acts of any individual, not merely against a state's own acts.

Whether by eliminating the elusive concept of state action, or by broadening it to include failure to protect the Negroes' equal rights, this Court has in **United States v. Guest**, 383 U. S. 745 (1966), held that Congress has the power to protect the people of the United States against racial discrimination, whether such discrimination is committed by official agencies of a state or by private individuals acting within a state. Even if the statute could not be sustained under the Thirteenth Amendment alone, or under Sec. V of the Fourteenth Amendment alone, Congress would have the power to enact it under these Amendments considered together with the commerce clause, because the right to live, work and pursue happiness wherever a person may choose, free from discrimination based on color of skin is part of the specially protected right of travel between the states, upheld in **Crandall v. Nevada**, 6 Wall. 36 (1867); **Edwards v. California**, 314 U. S. 160 (1941), and **Heart of Atlanta Motel v. United States**, 379 U. S. 241 (1964). The Statute does not interfere with any valuable property right, as it merely means that property, if it is for sale or lease, must be sold or leased without discrimination. It is a valid means, perhaps the only valid means, to the constitutionally valid end of eliminating segregation and discrimination in housing, which is at the basis of the unconstitutional second-class citizenship of Negroes in this country. The Civil War was fought precisely to end this social evil, which is tearing our nation apart now, as it was then. Surely Congress has the power to enact this legislation or any legislation necessary to solve this most basic national problem.

4. Aside from any legislation, and conceding for purposes of argument that the affirmative state action requirement is still part of the law, there is sufficient state action

alleged in this case to require Respondents to deal with Petitioners in a non-discriminatory manner. The State of Missouri, and its political subdivisions, contribute by law and administrative action in countless ways to the building of Paddock Woods, and other segregated communities in St. Louis County.

But even without such a direct contribution, there is state action in this case. This action arises by way of the delegation of governmental and municipal functions to the developers. As in **Marsh v. Alabama**, 326 U. S. 501 (1946) and **Terry v. Adams**, 345 U. S. 461 (1953), where governmental functions are delegated to private individuals, corporations and groups, constitutional rights must be respected. The segregation achieved by the delegation of the right to build and govern Paddock Woods on a segregated basis is no different than segregation achieved by direct legislation in **Buchanan v. Warley**, 245 U. S. 60, 79 (1917). The state should not be allowed to do indirectly what it can not do directly. The discrimination of the developers is, therefore, barred by the Fourteenth Amendment above, because it is the act of the state's authorized delegate.

ARGUMENT.

I. The Civil Rights Act of 1866 prohibits discrimination because of race in the sale of housing.

Section 1 of the Act of April 9, 1866, 14 Stat. 27 entitled, "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication", provides as follows:

> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."[1]

The Statute was first enacted by Congress under authority of the Thirteenth Amendment, Sec. 2, in the attempt to eliminate slavery and all the badges thereof.[2]

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[1] In codifying this section, it was divided into two parts, but the language remains essentially the same. See 42 U. S. C., Secs. 1981 and 1982 (App., p. 64).

[2] As to the purposes of the Thirteenth Amendment, see J. ten Broek, "The Antislavery Origins of the Fourteenth Amendment" 143-44 (1951).

After the ratification of the Fourteenth Amendment this law was re-enacted pursuant to Section 5 thereof.[3]

The law applied to all of the United States, and not just to the "freedmen" in the southern states. It follows that the bill was intended not just to prohibit the actual owning of a slave, but also to remove the incidents thereof, including the stigma which attached to being Negro by virtue of the decision of this Court in **Scott v. Sandford**, 19 How. 393 (1857), wherein it was held that even free Negroes were of an inferior class who were not entitled to any of the rights of ordinary citizens.

Although the 1866 Act itself uses the broadest imaginable language, it has been argued that the Congress merely intended by this law to repeal the "black codes" and other state statutes providing for discriminatory treatment of Negroes. Aside from the fact that the Thirteenth Amendment, and subsequently the Fourteenth Amendment, made these laws unconstitutional without such a statute, it can be clearly shown from the legislative history that Congress was well aware that the incidents of slavery could be re-imposed by the discriminatory conduct of individuals condoned by the silence of state legislatures, as well as by the direct action of state legislatures.[4]

It would have been relatively easy for Congress to provide that no state shall pass a law containing discriminatory provisions based on race, but Congress did not do this. Instead Congress enacted a law creating certain positive rights for Negro citizens, which rights it considered to be the fundamental rights of citizenship.[5]

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[3] As to the purposes of the Fourteenth Amendment, see footnotes 8 and 9 below.

[4] See Frank & Monroe, "The Original Understanding of 'Equal Protection of the Laws'," 50 Colum. L. Rev. 131, 138-140 (1950).

[5] The enumeration of the rights protected is reminiscent of Mr. Justice Washington's summary of the fundamental priv-

In creating this remedy, Congress, knowing the ingenuity of the human mind and the self-perpetuating nature of racial prejudice, did not seek to enumerate the means by which these fundamental rights could be denied, but simply forbade their denial by any means.

The argument that this law was passed merely to overthrow the "black codes" or discriminatory legislation is also belied by the very words of the law, which go much further. In addition to giving the right to sue, be parties, and give evidence, the statute gave the right to make and enforce contracts. Thus the Congress recognized that the right to enforce a contract in court would be valueless, if no one would contract with a Negro; and provided that racial discriminations could not be made in the act of contracting or refusing to do so. Furthermore, since the statute gives Negroes equal rights to make and enforce all contracts, the specific right to buy, sell and lease property must include the equal opportunity to buy any given piece of property, which is up for sale, or else it would be a meaningless addition to the right to make contracts.

Moreover, in addition to providing for Negroes the "full and equal benefit of all laws and proceedings for the security of person and property," which in itself would make illegal all discriminatory laws as to Negroes' rights to hold property, as well as discriminatory conduct by administrative officials such as Recorders of Deeds in denial of such rights; Congress provided that Negroes should have the same rights as white citizens to inherit, purchase, lease, sell, hold and convey real and personal property.

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ileges of citizenship in **Corfield v. Coryell,** 4 Wash. C. C. 371, 6 Fed. Cases 546, 557 (E. D. Pa. 1823), which included:

> "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . the right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . ., to take, hold and dispose of property either real or personal . . ."

Although the court below raised the question as to whether or not Congress intended to create a duty to sell without discrimination (A. 61a-62a), it is clear that if this language is to be given any meaning at all, it must at least be interpreted to mean that a person cannot be refused the right to buy or lease property solely because of the color of his skin. It is not argued, of course, that anyone must sell or lease his property just because a Negro wants to buy it. It is merely argued that if an owner is selling or leasing his property, he must not discriminate against any prospective or potential buyer simply because of the color of his skin.

Congress did not intend to create an illusory right to purchase, dependent upon the will of the sellers in the market to sell. If such is the case, the Joneses have no real right to live anywhere in St. Louis County, or for that matter in the State of Missouri, or any of the States of the United States. If the sellers are allowed to exclude Negroes from one area, they are equally allowed to exclude Negroes from all areas. Certainly, Congress did not mean to allow the owners and sellers of real estate to create the two "separate but equal" real estate markets, for Negroes and whites, which exist in the metropolitan St. Louis area, and in other areas of this nation.

At the time this statute was enacted, there were few, if any, Negro property owners in the United States. Congress in enacting this law, was attempting to support the Thirteenth (and later the Fourteenth) Amendments, not to repeal them. To interpret the law as leaving the right of Negroes to locate themselves throughout the United States to the mercy and charitability of the white owners of property would be to prevent the aims and intentions of Congress.

Thus, from the language of the statute, as well as from its legislative history, it is clear that Congress has created

a law giving all persons the equal opportunity to participate in the housing market, regardless of race, which cannot be used as a factor in refusing to participate in the sale or lease of housing.

II. Title 42, U. S. C., Sec. 1982, was validly enacted by Congress pursuant to the Thirteenth Amendment.

It has frequently been recognized by this Court that Sec. 1982 was enacted in 1866, before the Fourteenth Amendment had been proposed or ratified.

Mr. Justice Bradley stated in the **Civil Rights Cases**, 109 U. S. 3, 22 (1883):

> "Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color, and without regard to previous condition of servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens. . . . .
>
> "We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different. . . . The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. . . . Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, **may be direct and primary, operating on the acts of individuals, whether sanctioned by state legislation or not;**

under the Fourteenth, as we have already shown, it must necessarily be and can only be corrective and afford relief against state regulations or proceedings." (emphasis supplied)[6]

The Court below seemingly held, however, that on the basis of dicta in **Hurd v. Hodge**, 334 U. S. 24, 32, 33 (1948), and **Corrigan v. Buckley**, 271 U. S. 323, 330-331 (1925), Sec. 1982 was infected in some way by a "state action" requirement. This holding ignores the express language of the Thirteenth Amendment, which makes no reference to States, and the express language of Sec. 1982. Furthermore, it assumes that by re-enacting the law, Congress intended to limit its scope. Surely, if Congress had desired to limit the scope of Sec. 1982, it would have repealed it or rewritten it rather than re-enacting it verbatim. The clear intention of re-enactment was to give additional weight and remove any possible doubt as to its validity.

Certainly, the authority of **Corrigan v. Buckley**, 271 U. S. 323, 330-331 (1926), has been weakened by **Hurd v. Hodge**, 334 U. S. 24 (1948) itself, which held unenforceable the same type of racially restrictive covenant enforced in **Corrigan v. Buckley**. The language of Mr. Justice Vinson in **Hurd v. Hodge**, is at most dictum, which is not in harmony with either the prior or subsequent opinions of this Court cited above.

It is respectfully suggested that this Court, where it is constitutionally possible, should uphold the Act of Congress rather than to find ways of invalidating it simply because Congress enacted it twice in order to be sure it

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[6] Accord: **Buchanan v. Warley**, 245 U. S. 60, 78 (1917); **Clyatt v. United States**, 197 U. S. 207, 216 (1905); **United States v. Price**, 383 U. S. 787, 802, 804-5 (1966). The contrary implications of the Court and of Mr. Justice Bradley in **Virginia v. Rives**, 100 U. S. 313 (1879), were apparently overruled by the **Civil Rights cases**. 109 U. S. 3 (1883).

was valid. If Sec. 1982 can be upheld under the Thirteenth Amendment, the Fourteenth Amendment, or any other section of the Constitution, Petitioners urge that the Court should uphold it.

The only decision prior to this case, which directly involved the validity of this statute, was in the case of **United States v. Morris**, 125 Fed. 322 (E. D. Ark. 1903), in which Judge Treiber in a well-reasoned opinion held the act to be valid on the basis of the Thirteenth Amendment stating:

> "That Congress assumed that its power was derived from the amendment, and not from either of the later amendments, is conclusively shown by the fact that at the time this law was enacted, in 1866, neither the fourteenth nor fifteenth amendment had been ratified, or even submitted by Congress to the states * * * The language of the thirteenth amendment differs materially from that used in the two later ones. While the fourteenth amendment provides that 'no state shall make or enforce any law which shall abridge,' etc., and the fifteenth amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account * * *', the thirteenth amendment declares, 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction'. There is no limitation in that amendment confining the prohibition to the states, but it includes everybody within the jurisdiction of the national government. . . .
>
> "In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every

citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment. . . . .

"That the rights to lease lands and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable, and a conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)." 122 Fed. 322-324, 330, 331.

Other provisions of the Civil Rights Act of 1866 have also been upheld as validly enacted under the Thirteenth Amendment. See **U. S. v. Rhodes**, 1 Abb. 28, 27 Fed. Cases 785, 793-4 (D. Ky. 1866); **In Re Turner**, 1 Abb. 84, 24 Fed. Cases 337 (1867); **Smith v. Moody**, 26 Ind. 299 (1866). In the case of **United States v. Cruikshank**, 1 Woods 308, 25 Fed. Cases 707 (D. La. 1874), the court was dealing with the Act of May 31, 1870, 16 Stat. 140 (1870), but its comments as to the power of Congress under the Thirteenth Amendment are equally applicable to the Civil Rights Act of 1866. The Court stated at 25 Fed Cases 711-712:

"As disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that Congress had the power under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race.

"Conceding this to be true (which I think it is) Congress then had the right to go further and enforce its declaration by passing laws for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus

conferred upon him . . . It cannot be doubted therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise of the rights and privileges conferred by the Thirteenth Amendment and the laws passed in pursuance thereof . . .

"If in a community or neighborhood composed principally of whites, a citizen of African descent . . . should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race . . ."

See also **United States v. Price**, 383 U. S. 787, 804-5, and the appendix at 383 U. S. 807 (1966) with respect to the purposes of the Enforcement Act of 1870, which was necessarily intended to apply to individuals, because the states were helpless to act, or protect Negroes, even when they wanted to do so.

Mr. Justice Harlan, in his dissenting opinion in **Hodges v. United States**, 203 U. S. 1, 29-33 (1906), said the same thing in relation to the Civil Rights of 1866, 14 Stat. 27. He dealt precisely with the questions of the power of Congress under the Thirteenth Amendment as follows:

"The 13th Amendment, it is conceded, did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law. My brethern admit that it established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man

from owning another as property? Was it the purpose of the Nation simply to destroy the institution, and then remit the race theretofore held in bondage, to the several States for such protection, in their civil rights necessarily growing out of freedom, as those States, in their discretion, might choose to provide? Were the States against whose protest the institution was destroyed, to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom? Had the 13th Amendment stopped with the sweeping declaration, in its 1st section, against the existence of slavery and involuntary servitude, except for crime, Congress would have had the power, by implication, according to the doctrines of **Prigg v. Commonwealth of Pennsylvania**, repeated in **Strauder v. West Virginia**, to protect the freedom established and, consequently, to secure the enjoyment of such civil rights as were fundamental in freedom. That it can exert its authority to that extent is made clear, and was intended to be made clear, by the express grant of power contained in the 2d section of the Amendment.

"That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the 13th Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights Act of 1866. Whether that Act was authorized by the 13th Amendment alone, without the support which it subsequently received from the 14th Amendment, after the adoption of which it was re-enacted with some additions, my brethren do not consider it necessary to

inquire. But I submit, with all respect to them, that its constitutionality is conclusively shown by their opinion. They admit, as I have said, that the 13th Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the Act of 1866, passed in view of the 13th Amendment, before the 14th was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens; that under the 13th Amendment, Congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.".

Inasmuch as this Court recognized the broad extent of Thirteenth Amendment congressional power in even the **Civil Rights Cases**, 109 U. S. 3 (1883), it is unrealistic at this late date to impose a "state action" requirement on Thirteenth Amendment legislation.

The **Civil Rights Cases**, 109 U. S. 3 (1883), can be distinguished from this case precisely on this point. The right to sit in the dress circle at the theater or opera, or to ride in the "ladies car" or even to stay in a hotel involved in that case (denominated "social rights" by Mr. Justice Bradley) were not protected under the Civil Rights Act of 1866, which only applies to the basic and fundamental civil rights. Although Congress has now seen

fit to specifically protect these less important civil rights by legislation upheld by this Court,[7] it was in 1866, under the Thirteenth Amendment, seeking only to protect the most basic and fundamental rights. Of all these, the right to choose a place to live and work, without the burden of racial discrimination, would certainly seem to be the most basic.

III. The Civil Rights Act of 1866 was validly re-enacted pursuant to Authority granted to Congress by the Fourteenth Amendment.

Sec. 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 5 provides:

> "The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Although it may be argued that the right to equal opportunity in housing is one of the basic privileges of citizenship, secured by Article IV, Sec. 2, and by that clause of the Fourteenth Amendment which protects the privileges and immunities of citizens of the United States, and although it can also be argued that the denial of this right is a deprivation of liberty and property without due

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[7] **Heart of Atlanta Motel, Inc. v. United States**, 379 U. S. 241 (1964).

process of law,[8] Petitioners call attention primarily to Sec. 5 of the Fourteenth Amendment, and to that clause which provides:

> "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

Although this Court seemingly held in the **Civil Rights Cases**, 103 U. S. 9 (1883), that Congress had no power under the Fourteenth Amendment to legislate against acts of individuals denying equal protection, because the act of an individual is not the act of a state, the Court has never struck down Sec. 42 U. S. C., Sec. 1982, specifically, and in fact has referred to its provisions as an aid to interpretation of the Fourteenth Amendment. **Buchanan v. Warley**, 245 U. S. 60, 78 (1917).

As Mr. Justice Goldberg pointed out in his concurring opinion in **Bell v. Maryland**, 378 U. S. 226, 292 et seq. (1964), one of the prominent purposes of the Fourteenth Amendment was to provide a firm constitutional basis for the Civil Rights Act of 1866, and to eliminate any doubt about its validity under the Thirteenth Amendment alone.[9]

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[8] See **Kent v. Dulles**, 357 U. S. 116 (1958), where the denial of the right to travel was so treated.

[9] In H. Flack, **The Adoption of the Fourteenth Amendment** (1908), the purposes of the Fourteenth Amendment are carefully explored.

Rep. Bingham, who introduced the equal protection clause and had voted against the Act of 1866, because he felt that it was beyond the constitutional power of Congress, clearly intended by this Amendment to give Congress the power to declare what rights were protected and to protect such rights by direct action. Flack, *supra*, at 79-81. No one in fact questioned that the Fourteenth Amendment would achieve this purpose, some feeling that the Amendment would not only give authority for the Civil Rights Bill (which was subsequently re-enacted pursuant to the additional Fourteenth Amendment authority), but that the Fourteenth Amendment actually made the principle of the Civil Rights Act a part of the Constitution itself, forever securing the fundamental rights of all citizens, be they black or white. Flack, *supra*, at 90, 95-97, 136-139.

The fact that the Fourteenth Amendment was intended to give Congress the power to prohibit discriminatory conduct by individuals as well as States, had been documented by all historical authorities.[10]

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[10] Flack, who was in sympathy with the outcome of the **Civil Rights Cases,** concluded:

> "However futile were the efforts of Congress to give vitality to the Amendment as interpreted by itself and by those who had most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. The evidence given in this chapter but corroborates and strengthens that given in the previous chapters as to the meaning of the Fourteenth Amendment, while all that has gone before sustains the position and contentions of those who advocated the several measures considered in this chapter. This does not mean that those measures were wise or just, and should have been passed, but it merely means that, according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several State Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States." Flack, *op. cit., supra* at p. 277.

In the exhaustive article by John P. Frank and Robert P. Munroe, "The Original Understanding of 'Equal Protection of the Laws'," 50 Colum. L. Rev. 131 (1950), it is concluded that the commonly given interpretation that the equal protection clause applies only to affirmative state action is "so foreign to the conception of those who passed the amendment that no real assessment of it can be made in terms of reconstitution attitudes," 50 Colum. L. Rev., at 131, 162. The Civil Rights Act of 1866, *id.* 150, as well as the Civil Rights Act of 1875, *id.* 158 and 160, are cited as conclusive authority that the Congress of the time of the enactment of the Fourteenth Amendment had no doubt that the power was given to prohibit individual denial of the fundamental rights on account of race.

Carl Schurz, Senator from Missouri, spoke most eloquently on the purposes of the Civil War Amendments during the debates on the 1870 Act. (Cong. Globe, 40th Cong., 1st Sess., 3607-8):

> . . . We are charged with having revolutionized the Constitution of the country by the amendments recently ratified; and that charge is reiterated so often that we have reason to suppose our opponents must consider it a crushing argument. Well, sir, I do not deem it necessary to

If the Fourteenth Amendment had been intended only to prohibit the affirmative discriminatory action of states, it would simply have provided that no State should discriminate; but instead the language goes much further,

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enter a plea of "not guilty." On the contrary, I acknowledge the fact, and I suppose the Republican party is by no means ashamed of it. Yes, sir, this Republic has passed through a revolutionary process of tremendous significance. . . . What was that constitutional revolution which the Democrats denounce as so fearful an outrage? In order to understand it fully, we must cast a look back and see what the constitutional polity of the United States was before the civil war, according to the Democratic interpretation of the Constitution then prevailing.

. . . We remember also that the slave power, finding itself at war with the conscience of mankind, condemned by the enlightened spirit of this age, menaced by adverse interests growing stronger and stronger every day, sought safety behind the bulwark of what they euphoniously called local self-government, and intrenched itself in the doctrine of State sovereignty. . . .

Finally that structure of fallacies, still so overshadowing but ten short years ago, tumbled down. . . . It was finally overthrown by the shock of the great revolution. **And what did that revolution put in its place? It gave us three great amendments to the national Constitution. . . . And all three empower Congress to pass appropriate legislation for their enforcement.**

That is the result of the great constitutional revolution. What does this result signify? **The war grew out of the systematic violation of individual rights by State authority. The war ended with the vindication of individual rights by the national power.** The revolution found the rights of the individual at the mercy of the States; it rescued them from their arbitrary discretion, and placed them under the shield of national protection. It made the liberty and rights of every citizen in every State a matter of national concern. Out of a republic of arbitrary local organizations it made a republic of equal citizens—citizens exercising the right of self-government under and through the States, but as to their rights as citizens not subject to the arbitrary will of the States. **It grafted upon the Constitution of the United States the guarantee of national citizenship; and it empowered Congress, as the organ of the national will, to enforce that guarantee by national legislation.** That is the meaning of that great revolution; and if Democratic Senators denounce the bill at present before us as its offspring they are welcome. I accept the name. (Emphasis supplied).

and says that no State shall deny equal protection to all persons within its jurisdiction.

As was stated by Mr. Justice Brennan in **Bell v. Maryland,** 378 U. S. 226 (1964), the pervading purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to securely and firmly establish the freedom of the newly made freed-men and citizens and to protect them "from the oppressions of those who had formerly exercised unlimited dominion over him." Mr. Justice Brennan went on to state that discrimination is a relic of slavery, and segregation a substitute for the Black Codes, thus clearly recognizing the intent of the framers of the Amendment to prohibit racial discrimination of all types.

Even Mr. Justice Bradley, in the **Civil Rights Cases,** recognized that the wrongful denial of civil rights by an individual could only take place if authorized by a state, and that the State could not constitutionally authorize such an action by individuals. To get around this admission, Justice Bradley resorted to the fiction that the individual who committed the active discrimination, would render himself amenable to satisfaction or punishment in accordance with laws of the State where the discrimination was committed, 109 U. S. 3, 17 (1883).[11]

This Court has frequently recognized that a State denies equal protection by taking action which expressly allows an individual or a group of individuals to discriminate, even though the State does not directly participate in or even condone the discrimination. In **McCabe v. Atchison, Topeka & Santa Fe Ry Co.,** 235 U. S. 151 (1914), it held invalid a law permitting (but by no means requiring or recommending) railway companies to haul sleeping or chair cars to be used by whites or

[11] Mr. Justice Goldberg pointed out in **Bell v. Maryland,** 378 U. S. 226, 308-9 (1964), that the assumption of state remedy is generally inapplicable, and is no longer appropriate.

Negroes exclusively. In **Terry v. Adams,** 345 U. S. 461 (1953), it held that the exclusion of Negroes from voting in a private organization's pre-primary was invalid. In **Reitman v. Mulkey,** 387 U. S. 369 (1967), a state constitutional amendment permitting discrimination in sales or rental of housing which was previously illegal by virtue of state statute was struck down. **Brown v. Board of Education,** 347 U. S. 483 (1954), and **Aaron v. Cooper,** 358 U. S. 1 (1958), made it illegal to permit the operation of segregated public schools. The Fifth Circuit in **Bowman v. Birmingham Transit Co.,** 280 F. 2d 531 (5th Cir. 1960), found it illegal for the State to permit a private company to operate segregated busses. In **Marsh v. Alabama,** 326 U. S. 501 (1946), it was held that a privately owned company town could not deny constitutionally protected rights of free speech.

In **Shelley v. Kraemer,** 334 U. S. 1, (1948), and **Barrows v. Jackson,** 346 U. S. 249 (1953), this Court held that a State could not permit private individuals to perpetrate segregation by use of its Courts to enforce by injunction or award of damages private agreements in the form of restrictive covenants to bar Negroes from housing.[12]

In **Burton v. Wilmington Parking Authority,** 365 U. S. 715 (1961), it was held to be illegal for a State to permit a

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[12] The involvement of the state in these cases consisted of merely making available its courts to enforce private agreements. If, for instance, the Joneses had tendered their check to the developers and simply camped out on the lot in Paddock Woods and the developers had brought an action to evict them, as they would undoubtedly have the right to do under Missouri law, we would have exactly the same state involvement as in **Shelley v. Kraemer.** See **Abstract Investment Co. v. Hutchinson,** 204 Cal. App. 2d 242, 22 Cal. Rep. 309 (1962), forbidding use of courts by private landlord to evict tenants because of race. See also **Garner v. Louisiana,** 368 U. S. 157 (1961), Mr. Justice Douglas concurring at pp. 178-184; **Lombard v. Louisiana,** 373 U. S. 267 (1963), Mr. Justice Douglas concurring at pp. 279, 280.

restaurant operating as its lessee to bar Negro customers. In **Smith v. Holiday Inns of America**, 220 F. Supp. 1, 9-10 (N. D. Tenn. 1963), **aff'd** 336 F. 2d 630 (6th Cir. 1964), it was held, before the enactment of the Civil Rights Act of 1964, that a privately owned motel, which had bought its land from the Nashville Housing Authority, was prohibited from discriminating against Negroes.

In addition, the Court has recognized that a denial of civil rights can result from the failure of the State to act, as well as from its affirmative discrimination. In **Baker v. Carr**, 369 U. S. 186 (1962), failure to redistrict in accordance with constitutional requirements was held to create a cause of action, and in **Catlette v. United States**, 132 F. 2d 902 (4th Cir. 1943), failure by the state to protect the constitutional rights of an individual, resulted in conviction of a sheriff.

It would follow that under the broad powers granted to Congress by Sec. V of the Fourteenth Amendment, it can enact legislation preventing the denial of civil rights by private action due to the failure of the State to protect those rights, as well as such denial due to the positive act of the State. Indeed, the greater part of the discrimination which takes place in this country is done without specific authority of State law, but with the tacit consent of the State.

This Court has in recent decisions uniformly held that the power of Congress with respect to the enactment of laws for the protection of civil rights will be respected.

In **Katzenbach v. Morgan**, 384 U. S. 641 (1966), this Court specifically upheld the power of Congress under Sec. 5 of the Fourteenth Amendment to enact legislation forbidding the denial of the right to vote to persons educated in the Spanish language, simply because they cannot speak English.

In **South Carolina v. Katzenbach,** 383 U. S. 301 (1966), the Court upheld action by Congress under Sec. 2 of the Fifteenth Amendment, which is exactly similar in scope with Sec. 5 of the Fourteenth Amendment, to prohibit the denial of equal voting rights, whether by the state officially or by individuals.

In **United States v. Guest,** 383 U. S. 745, 762 (1966), Mr. Justice Clark concurring, joined by Mr. Justice Black and Mr. Justice Fortas, stated:

> "the specific language of Sec. 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."

In the same case, Mr. Justice Brennan, concurring, joined by Mr. Chief Justice Warren and Justice Douglas, stated:

> "a majority of the members of the Court express the view today that Section 5 empowers Congress to enact laws punishing **all** conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, 'speaks to the State or to those acting under the color of its authority', legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, Sec. 5 authorizes Congress to make laws that it considers are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise

of such a right is necessary to its full protection . . .

"I acknowledge that some of the decisions of this Court, most notably an aspect of the **Civil Rights Cases**, 109 U. S. 3, 11, have declared that Congress' power under Sec. 5 is confined to the adoption of 'appropriate legislation for correcting the effects of . . . prohibited State laws and State acts . . .' I do not accept and a majority of the court today rejects —this interpretation of Sec. 5. It reduces the legislative power to enforce the provision to that of the judiciary; (citations omitted) and it attributes a far too limited objective to the Amendment's sponsor."

Justice Brennan then applies the classic test of the constitutionality of legislation, stated in **McCulloch v. Maryland**, 4 Wheat. 316, 421 (1819):

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

He goes on to state:

"It seems to me that this is also the standard that defines the scope of congressional authority under Sec. 5 of the Fourteenth Amendment . . .

"Viewed in its proper perspective, Sec. 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equalty for all citizens." 383 U. S. 745, 781-784.[13]

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[13] The out-of-slant perspective which would limit Congressional power under Sec. V of the Fourteenth Amendment can be corrected by reference to **Prigg v. Pennsylvania**, 16 Pet. 539

With the doctrine announced in the **Guest** case by Mr. Justice Brennan it has become clear that this Court will no longer restrict Congress's legitimate scope of action in protecting civil rights denied to Negroes by white majorities, with the tacit consent or permission of their government.

Regardless of whether or not one takes the view that the requirement of "state action" derived from the **Civil Rights Cases**, 109 U. S. 3 (1883), has been completely nullified by the more recent holdings of this Court,[14] or

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(1942), where the court upheld federal legislation granting an individual the right to make a claim upon another individual for return of a slave, or a person alleged to be a slave, under Art. IV, Sec. 2, Clause 3 of the Constitution, which stated:

> "No person held to service or labor in one State, under the laws thereof, escaping into another shall, **in consequence of any law or regulation therein,** be discharged from such service or labor, but he shall be delivered up on claim of the party to whom such service or labor may be due." (Emphasis supplied.)

Mr. Justice Storey justified this legislation's application to private individuals by stating "that the local legislation may be utterly inadequate to furnish appropriate redress and that the state legislation may be entirely silent on the whole subject". Mr. Justice Storey was not troubled by lack of any express power in Congress to legislate, and went so far as to state that Congress's power was exclusive. 16 Pet. 539, 611, 613, 616, 618.

If this Court were to apply the same zeal to the right of Congress to legislate to protect the civil rights of citizens under the Fourteenth Amendment, which contains an express grant of legislative power, and is not specifically limited to events occurring "in consequence of any law or regulation", as was in **Prigg** applied to the right of Congress to protect the slave-owner, there would be no difficulty in recognizing the validity of Sec. 1982.

[14] The concept of state action is described by Charles L. Black, Jr. in "Foreword, State Action, Equal Protection and California's Proposition 14", 81 Harv. L. R. 69, 95 (1967), as follows:

> "It now exists principally as a hope in the mind of racists (whether for love or profit) that somewhere, somehow, or to some extent, community organization of racial discrimina-

the view that "state action" has been re-interpreted more in line with actual language of the Amendment, prohibiting any state from denying equal protection by allowing individuals or groups to discriminate within the State, it is clear that Sec. V of the Fourteenth Amendment gives Congress broad power to define the protection of civil rights which it finds appropriate for citizens and persons within the United States. Congress has by Sec. 1982 protected the rights of Negroes to participate equally in the housing market with whites, and the means chosen by Congress to achieve this great purpose were reasonably calculated to bring it about.[15]

In sustaining the Civil Rights Act of 1964, in **Heart of Atlanta Motel, Inc. v. United States,** 379 U. S. 241 (1964), barring discrimination in hotels, restaurants and other places of public accommodation, this Court relied on the power of Congress to regulate discriminatory practices which have a substantial affect on interstate commerce. The commerce clause, Art. I, Sec. 8, Clause 3 of the Constitution, was expressly excluded from consideration in the **Civil Rights Cases,** but it is obvious that discrimination in housing has a much greater effect on commerce than discrimination in public accommodations, because discrimination in housing keeps Negroes at a distance where they cannot successfully compete for

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tion can be so featly managed as to force the Court admiringly to confess that this time it cannot tell where the pea is hidden."

[15] As to the power of Congress under Sec. V of the Fourteenth Amendment, see also Mr. Justice Douglas concurring in **Heart of Atlanta Motel v. Katzenbach,** 379 U. S. 241 (1964). who would have rested the opinion on that ground alone if necessary. See also the separate concurrences in that case of Mr. Justice Goldberg, and Mr. Justice Black, who, although not considering whether the case could rest on Sec. V alone, applied the same constitutional test of legislative propriety under the Thirteenth, Fourteenth and Fifteenth Amendments as under the Commerce Clause itself.

jobs,[16] and where they cannot send their children to adequate integrated schools.[17]

The right to choose a place to live is in fact the most basic civil right of all, because it affects every aspect of a person's life—the kind of job he can find, the kind of

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[16] There can be no right more basic to our survival as a free and democratic nation than the right of each person to seek a livelihood for himself in the location of his choice. The cost of the bar against Negroes in the suburbs of St. Louis is graphically illustrated by the fact that between 1954 and 1964, the number of available jobs in St. Louis County, where Paddock Woods is located, increased by 47,600 while the number of jobs in the separate entity of the City of St. Louis decreased by 9500. Between 1950 and 1960 the non-white population of St. Louis increased by 62,000 while the white population decreased by 214,377. Negroes constitute 36% of the population of the City of St. Louis where 22% of the families earn less than $3,000.00 a year. In St. Louis County, where only 7% of the families earn less than $3,000.00 per year, Negroes constitute only 2.7%, most of these living in impoverished "pocket ghettoes" left over from the days before suburban living became the preferred way to escape from integrated schools.

> City of St. Louis, Application to the Dept. of Housing and Urban Development for a Grant to Plan a Comprehensive City Demonstration Proposal, April 26, 1967, p. 7.

[17] The Missouri Commission on Human Rights reported in 1961 that no significant advance had occurred in desegregating Missouri's public schools. (Report of U. S. Commission on Civil Rights, **50 States Report**, p. 357.) It recommended:

> "That immediate steps be taken to free housing from racial and religious restrictions, thereby eliminating racial ghettoes, which perpetuate racial segregation in the schools in spite of sincere efforts of boards of education to put an end to such segregation" (at p. 358).

The United States Commission on Civil Rights reported in 1967 that segregation in public schools has increased over the last 15 years, particularly in northern cities. (Report of U. S. Commission on Civil Rights, **Racial Isolation in the Public Schools** (1967), at 8, 199.)

The racial isolation between city and suburb, made possible by state governmental boundaries and the delegation of housing functions to private developers, which is the subject matter of this action, is described by the Commission, which concludes:

> "The organization of school districts would not be of special significance if the racial and socio-economic groups

school to which he can send his children, and in fact the candidates for whom he can vote. Since housing is so closely tied to our representative system of government, it is essential that the right to live anywhere without discrimination be enforced. It cannot be denied that the voting power which Negroes would normally have, as a minority of over 20,000,000 people has largely been nullified by housing discrimination, which keeps the Negroes in congested voting districts, where they can only elect a certain number of representatives, and limits the impact they would have as a "swing group" if they could spread themselves out in a normal manner. It means that the representatives of our suburban and white rural regions can continue to ignore the Negro's problems, because they have successfully excluded Negroes from their constituencies.

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they served were fairly representative of the entire metropolitan area. But city and suburban school districts generally serve separate economic, social, and racial groups." (Idem. at 200.)

The Commission stated also,

"In large part, the separation of racial and economic groups between cities and suburbs is attributable to housing policies and practices." (Idem. at 20-25.)

going on to describe the means by which segregation is carried out by tacit cooperation of private industry, local government and Federal government.

This full report of the Commission goes on to outline the total failure of compensatory education plans in trying to make "separate" education equal, and the startling evidence that desegregation itself has a profound beneficial effect on the general performance of students (idem. at 120-140), concluding among other things that the finding of this Court that segregation "affects the hearts and minds of children in ways unlikely ever to be undone" applies to segregation compelled by housing discrimination as well as to that segregation compelled only by mandatory school segregation laws (idem. at 193). Its conclusions (idem. at 193) and findings (idem. at 199) go to the heart of the public policy involved in this case.

The Supplementary Statement at p. 213 of Mrs. Frankie Freeman who aside from being a Commissioner is Chief Counsel for the St. Louis Land Clearance for Redevelopment Agency and the St. Louis Housing Authority is also most revealing.

Petitioners contend that it simply is not a proper function of any government, or any group of people, to determine that any group shall be excluded from living within its boundaries, because it allows a manipulation of representation, which is incompatible with democracy, and which in the long run, if allowed to continue unchecked, will destroy representative government itself. One of the primary purposes of the republican form of government guaranteed by Art. IV, Sec. 4 of the Constitution is to secure certain rights to members of minority groups, which cannot be taken away. If the majority group is allowed to nullify the voting power of minorities, by setting up its own artificial boundaries, we no longer have this protection, but we have in effect a continuation of slavery. [18]

The constitutional right to travel without hinderance throughout the various parts of the United States, protected in **Heart of Atlanta Motel v. United States**, 379 U. S. 241 (1964), has frequently been recognized by this Court as specially protected. In **Crandall v. Nevada**, 6 Wall. 36, 43-44 (1867), this Court, in striking down an attempt to levy a tax on that right, stated that government offices of necessity had to exist throughout the land, and that citizens necessarily must have the unrestricted right to travel to these offices both to work there as government officers and to transact their business with the government.[19] As Mr. Justice Stewart stated in

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[18] The point that the balance of powers between state and federal government was intended by the framers of the Constitution to protect the individual against the abuses of the majority, and that federal non-intervention in matters involving the protection of federal rights against abuse by local authorities goes against the grain of the Constitution itself is developed in a note entitled "Theories of Federalism and Civil Rights," 75 Yale L. J. 1007 (1966).

[19] It is worthy of note that the Joneses at the time of filing this suit were both employees of the United States government, working for the Veterans Administration (A. 3a).

United States v. Guest, 383 U. S. 745, 757 (1966), the right to travel from one State to another occupies a position fundamental to the concept of federal union.

The right to live in any place in the United States, Petitioners suggest, is an essential part of the right to travel in any place in the United States, which, as noted above, has always been granted special protection by our constitution. The Court in **Edwards v. California**, 314 U. S. 160 (1941), based this right on the fact that its denial was a constitutional burden on interstate commerce. Mr. Justice Douglas in concurrence, joined by Mr. Justice Black and Mr. Justice Murphy, placed the right as one of the fundamental rights of national citizenship, relying on **Crandall v. Nevada**, supra; **Williams v. Fears**, 179 U. S. 270, 274, and the **Slaughterhouse Cases**, 16 Wall. 36; 75-79 (1873). Mr. Justice Jackson, also concurring stated:

> "This court should, however, hold squarely that it is a privilege of citizenship in the United States, protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence thereof. If national citizenship means less than this, it means nothing.
>
> "Property can have no more dangerous, even if unwitting enemy, than one who would make its possession a pretext for unequal or exclusive civil rights . . .
>
> "Unless this Court is willing to say that citizenship of the United States means at least this much to the citizens, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." 314 U. S. 160, 183-185 (1941).

The right to purchase or rent housing, free of discrimination, claimed by the Joneses, is basic to their rights

as citizens of the United States. Since this Court has now sustained civil rights legislation as to public accommodations and employment, it should not have any difficulty in sustaining Sec. 1982 as to housing. In the first place the interference with property rights of others is much less. Sec. 1982 merely tells property owners they cannot discriminate in disposing of the property. A person who sells a house, obviously has no important protectible interest in who buys it. Even in a lease situation, the landlord is rarely in personal contact with his tenant, and really has no valid interest in who rents the property other than to see that the rent is paid and that the property is not damaged.

For reasons similar to these, there has long been a policy in the law against too many restraints as to future alienation or use of property.

This Court has already approved the right of Congress to prohibit discrimination in the personal relationship which arises between the proprietor of a public accommodation and his customer, and the still more personal continuing relationship between employer and employee. In correctly ruling that the interest of the Negro in obtaining equal access to public facilities and to employment outweighed the property rights of the proprietors and employers, the Court has made it easy to decide this case, which involves an even more basic right of the Negro to live where he can get a job and be enabled to use public accommodation facilities, as weighed against a less important property right of the residential property seller or landlord, who will ordinarily not be forced to have any further substantial contact with the buyer or tenant, once he has sold or leased the property to him.

The property right of the owner, often referred to by real estate people, is in fact surrounded by all sorts of restrictive laws, as to easements, building lines, height

regulations, sanitary conditions, zoning, housing standards. Many of these regulations, some of which are justified on the grounds that they contribute to the value of the property, are much more restrictive than Sec. 1982, which does not in any way affect the property itself. It is clear that the so-called property rights of white owners consist of no valuable right, but merely the right to maintain exclusive residential districts.[20]

This right is insignificant in comparison to the right of the Negro purchaser or lessee to participate in our society on the same basis as white people.

It is submitted that Sec. 1982 protecting the fundamental civil right to obtain housing without discrimination based on race, can be sustained, either under the Thirteenth Amendment alone or under Sec. V of the Fourteenth Amendment alone. If any doubt remains as to the power of Congress under these Amendments, the law can be sustained by consideration of the power of Congress under these Amendments, together with its power under the Commerce Clause.

IV. If "state action" must be found in order to sustain Petitioners' position, that "state action" exists abundantly in this case.

Although Petitioners contend that the Civil Rights Act of 1866, as a Congressional enactment, is sufficient to

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[20] Sometimes the argument is made that the introduction of Negroes into a neighborhood reduced property values. Although the argument itself has been proven false by L. Laurent, **Property Values and Race** (1960), and D. McEntire, **Residence and Race** (1960), it is obvious, that even if the argument were true, it would disappear if Negroes were free to move wherever their pocketbooks could take them, because there would no longer be any way to manipulate the market. The present pattern of movement on a "blockbusting" basis, with all whites fleeing after the first Negro family moves in, and the whole block turning Negro in a short time, is dependent upon the artificial restriction of purchasing of housing by Negroes.

decide this case without reaching the question of "state action," they also urge that regardless of that statute, Petitioners ought to prevail. The Constitution itself mandates that these Respondents may not racially discriminate against these Petitioners.

It is now clear beyond peradventure that neither the Federal government, nor any State, nor any governmental creature or official of either, may discriminate on racial grounds. See, **e. g., Brown v. Board of Education,** 347 U. S. 483 (1954). It is clear that governmental involvement limited to a property-law connection with a discriminatory use, for instance, racially discriminatory use of property leased from a government, will subject the leasehold and the lessee to constitutionally mandated non-discrimination, to the same extent as if the government operated the leasehold itself. See, **e. g., Burton v. Wilmington Parking Authority,** 365 U. S. 715 (1961). And it is clear beyond cavil that any substantial affirmative government aid given any person in the carrying out of his activities will subject those activities and that person to the same constitutional requirements which would govern the assisting government. See, **e. g., Reitman v. Mulkey,** 387 U. S. 369 (1967); **Simkins v. Moses H. Cone Memorial Hosp.,** 323 F. 2d 959 (4th Cir. 1963), **cert. denied** 376 U. S. 938 (1964).

On the facts of this case, the affirmative aid given Respondents by the State of Missouri and its various governmental subunits (See First Amended Complaint, para. 7. A. 7a-9a) would be sufficient to charge Respondents with the State's own constitutional responsibilities. But while it might be sufficient for this case to focus on the aid given Respondents by the State, there is another way of viewing the facts of this controversy: **one may look not at what the government is doing for Respondents, but at what Respondents are doing for the government.** Government action is a form of action, not a form of

organization; one no more needs a government for governmental action, than one needs a corporation for corporate action, or an articled partnership for a conspiracy. If what is being done by a person is governmental **action**, that **action** is subject to the requisites and standards of the United States Constitution whether carried out by a *de jure* governmental entity or official or not. And behind that proposition lies not only reason and policy, but an abundance of authority.

One line of that authority, the white-primary cases commencing over forty years ago with **Nixon v. Herndon**, 273 U. S. 536 (1926), is particularly piquant, because it so clearly illustrates the slow but apparently inexorable shift of judicial focus from what the state was doing to what was being done for the state. In **Nixon v. Herndon**, *supra*, a Texas statute barring Negroes from voting in election primaries was declared unconstitutional. In response to that decision the State of Texas repealed the offending provision, substituting for it another, which provided that the executive committees of the various political parties might set the voting requirements for their primary elections. The same Mr. Nixon who had sued the first time apparently had the energy to try again, and once again he won. **Nixon v. Condon**, 286 U. S. 73 (1932). But his victory, if not pyrrhic in the long run, was disastrous for the nonce. For the ground of the second decision was that the State, because it had mandated by statute that party **executive committees** should determine voting criteria, was still involved in the primary electoral process, which therefore could not be discriminatorily run. What the Court was impliedly saying was that if a state left voting criteria to the parties alone, without further instruction, the Constitution would not reach the parties' decisions, even though the result would be an all-white primary. The result of this focus on "state" rather than "action" (in the familiar rubric) was predictable: Texas

deleted the reference to party executive committees, and the Court validated the Texas procedure. **Grovey v. Townsend**, 295 U. S. 45 (1934).

Grovey lasted ten years. In **Smith v. Allwright**, 321 U. S. 649 (1944), it was expressly overruled. And that overruling was precisely on the ground that the function, the process, the activity involved was "state action", even though not carried out by the State.

> . . . because of the recognition of the place of the primary in the electoral scheme makes clear that **state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function** that may make the party's action the action of the State. 321 U. S. at 660 (emphasis added).

And the Court went on specifically to note that a state could not avoid its duties ". . . by casting the electoral process in a form which permits a private organization to practice racial discrimination. Constitutional rights would be of little value if they could be thus indirectly denied." 321 U. S. at 664.

In **Smith v. Allwright**, however, there was some remaining statutory connection between the State and the primary process, even though that connection was far short of voter-qualification controls. The **Smith** opinion was not absolutely, limpidly clear that its basis was solely the state-**function** argument, and that the decision would have come out the same way even if there were **no** statutory connection between the State of Texas and the primary process. See 321 U. S. at 662-64. Shortly after the **Smith** decision one court did read it to mean that a primary was a "state action" even with no state statutory connection. In response to Texas' defeat in **Smith**, South Carolina had repealed **all** state laws having **anything** to do with primaries. Faced with that situation, the Fourth

Circuit decided flatly that a state could not ". . . by permitting a party to take over part of its election machinery . . . avoid the provisions of the constitution forbidding racial discrimination in elections. . . ." **Rice v. Elmore**, 165 F. 2d 387, 389 (4th Cir. 1947). That was certainly clear enough, but certiorari was denied, 333 U. S. 857 (1948), and the question remained technically open.

For four years only. In 1952, **Terry v. Adams**, 375 U. S. 461 (1952), was decided. That case involved the "Jaybird" political organization, a sort of pre- or sub-party "club" in a Texas county. It had been founded in 1889 (**i. e.**, by no stretch of the imagination could it be deemed an evasive response to **Smith v. Allwright**), and it was clear that the State did not regulate the Jaybirds. But the Jaybirds held "elections", the winners of those "elections" ended up on the Democratic primary ballot, and the Jaybirds, of course, did not allow Negroes to vote. The Court firmly held that the activities of the Jaybirds constituted "state action" for constitutional purposes. After quoting its earlier language from **Smith v. Allwright** about "delegation of a state function" (quoted above) the Court went on to restate the **ratio** of that case even more strongly:

> For a state to **permit** such a duplication of its elections processes is to **permit** a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to **permit** within its borders the use of any device that produces an equivalent of the prohibited election. 345 U. S. at 469 (emphasis added).

Now, this forty-year progression is instructive. In culmination, with **Terry v. Adams**, it clearly involved a situation where the state-action component of the case was supplied, not by the state, but by the action. Defer-

ence to the earlier focus—that it must be a **government** which **does** something—may be seen in the repeated uses of the word "permit," a word which implies **some** governmental action. But the word "permit" describes an act only in a Pickwickian sense, for if the "act" of "permitting" is "state action," then **every** activity a private person is capable of doing, every Hohfeldian "power" which the state **could** forbid, would be "state action" subject to the strictures of the Fourteenth Amendment.

If one assumes that so sweeping a position was not intended in **Terry v. Adams**, then it must follow that there are only some **kinds** of "private" action which may not be carried out in a manner violative of the Constitution. What kinds?

If "state action" involves a certain kind of doing, not a certain kind of doer, what is the touchstone of that doing? **Marsh v. Alabama**, 326 U. S. 501 (1946), helps immensely to give form and contour to the answer to that question. **Marsh** involved members of a religious organization who attempted to distribute religious literature in a town which had "all the characteristics of any other American town" **except** that, like the community owned by Respondents in the instant case, it was wholly owned by a private corporation. When one of these proselytizers refused to desist, she was ejected and eventually convicted for refusing to leave private premises, the argument being that the First Amendment did not govern activities on private property. On appeal to this Court, it was accepted that the property was "private," but that was not found dispositive. "We do not agree," said the Court, "that the corporation's property interests settle the question." 326 U. S. at 504. Pointing out that an ordinance adopted by all of the residents of the "town" which sought to bar the dissemination of religious literature would have been clearly invalid, 326 U. S. at 505, the

Court held that no such restrictive power resided in the corporate owner of the community either.

But why not? Certainly each of the householders in the town, acting individually, could constitutionally evict religious proselytizers from their homes, calling upon police aid to do so if necessary; it has never been held that the First Amendment runs into one's living room, or that the use of police to help effectuate valid private rights necessarily turns their exercise into "state action." See **Peterson v. Greenville**, 373 U. S. 244, 247 (1963) and cases following; **cf. Watchtower Bible & Tract Society, Inc. v. Metropolitan Life Ins. Co.**, 297 N. Y. 339, 79 N. E. 2d 433 (1948). Why could not this private corporation call upon public police to evict proselytizers from its private property? Is this larger plot of private property, this so-called "town," any different from any other piece of private property from which, concededly, governmentally enforced exclusion would have been proper?

Of course it is. It is a town, a polis, an aggregation of public relationships no more analogous to a living room than the City of St. Louis. To pretend that the acts of that private, town-owning corporation were not governmental acts because it lacked political organization, would be about as reasonable as claiming that acts of General Motors Corporation were not corporate acts because one of its original incorporators was under age, or that a local sheriff's acts were not governmental because his election, years earlier, had been technically defective. What is important about **Marsh** is that in it the Court recognized and enunciated that "state action" is a matter of function, not organization; that given a certain functional reality, certain "private" activities transformed the actor, with respect to those activities, into a *de facto* government. The defendant in **Marsh**, a private corporation governing private property, was subject to the requirements of the First Amendment, not because it was

being helped in its goverance by the government, but because it was in itself a government, carrying out governmental activities.

If this explication of **Marsh** and the **White-Primary Cases** be adopted—that what determines "state action" is the function performed rather than the *de jure* organization of the performer—then a vast body of recent decisions attains intelligible and consistent shape.

It is unquestionable that there is a large and growing body of decisions in which racially discriminatory activity was forbidden under the Constitution even though the actual discriminator was not the government, or any agency or agent of the government. The common organizing principle used to explain most of these cases is to focus on the property-law relationship between the property involved and the government. In a large proportion of the cases, for instance, the government owned the fee to the property, and the discriminating private party was its lessee. See **e. g., Turner v. City of Memphis,** 369 U. S. 350 (1962); **Burton v. Wilmington Parking Authority,** 365 U. S. 715 (1961); **Muir v. Louisville Park Theatrical Ass'n,** 347 U. S. 971 (1954); **Greensboro v. Simkins,** 246 F. 2d 425 (4th Cir. 1957); **Derrington v. Plummer,** 240 F. 2d 922 (5th Cir. 1956); **Department of Conservation & Development v. Tate,** 231 F. 2d 615 (4th Cir. 1956), **cert. denied,** 352 U. S. 83 (1956); **Nash v. Air Terminal Service,** 85 F. Supp. 545 (E. D. Va. 1949). In at least one case no formal lease was involved, but it was held sufficient that a loan of public facilities was contemplated. **Statom v. Board of Comm'rs,** 233 Md. 57, 195 A. 2d 41 (1963). In still another case, **Hampton v. Jacksonville,** 304 F. 2d 320 (5th Cir. 1962), **cert. denied sub. nom. Ghioto v. Hampton,** 371 U. S. 911 (1962), an even more tenuous property-law nexus between the government and the affected property was found sufficient; when the government transferred a fee interest to a private party,

subject only to what may be classified either as a possibility of reverter or right of entry for condition broken, it was held that the grantee was charged with duties of non-discrimination. (And it should be noted that the critical breach of condition upon which the fee would revert was **not** integrated use by the grantee.)

Similarly, when what was involved in the discrimination was not real property, but a more incorporeal interest within the power of government to grant, a "private" grantee of such interest has also been held subject to the Constitution. See **e. g.**, the bus-franchise cases, **Public Utilities Comm'n v. Pollak**, 343 U. S. 451 (1952); **Boman v. Birmingham Transit Co.**, 280 F. 2d 531 (5th Cir. 1960); **Flemming v. South Carolina Electric & Gas Co.**, 224 F. 2d 752 (4th Cir. 1955). **And cf. Everett v. Riverside Hose Company No. 4**, 261 F. Supp. 463 (S. D. N. Y. 1966) (volunteer fire company).

Now, a property-nexus interpretation of these cases is perfectly accurate, and sufficient to explain them. If a government still "owns" property in some sense (and that sense is a very primary one if the government's interest is a fee), it is certainly sensible to hold that the Fourteenth Amendment may not be violated in the use of that government property. But that interpretation, focusing as it does on the government's property position, while a sufficient ground for the above cases, is not a necessary ground, or, it is submitted, the most accurate ground. There is another way of classifying all of the above cases, which not only rationally explains them, but permits a consistent and reasonable explanation of still other cases in which no property was left in the government at all.

To achieve that unifying explanation, one must again focus not on property but on function. And if one looks at what the discriminator (always a "private" person) in

each case was **doing** with the property granted or leased to him, the results are illuminating: **in each and every case the discriminating private person was engaged in carrying out a function of community-wide breadth which had previously or traditionally been carried out by a governmental body.** In other words, in each case the government's position as grantee or lessor was only a **symptom** of the real vice, discrimination in the provision of community services, rather than the vice itself. Since governments do not ordinarily hold, grant or lease property or powers except for the consummation of governmental functions, it is not surprising that in many cases wherein private parties carry out governmental functions there will be someplace in the history of the transaction a grant or lease from the government. But it is not the grant or lease which is the critical gesture, but the functions being carried out with the granted or leased property, which properly determines the reach of the Constitution.

Look at the cases cited above. **Turner v. City of Memphis, Burton v. Wilmington Parking Authority, Derrington v. Plummer,** and **Nash v. Air Terminal Service,** all involved eating facilities in public, community-serving buildings. **Muir v. Louisville Park Theatrical Ass'n, Hampton v. Jacksonville, Greensboro v. Simkins, Department of Conservation & Development v. Tate,** and **Statom v. Board of Comm'rs** all involved community recreation facilities—beaches, golf courses, theatres. **Public Utilities Comm'n v. Pollak, Boman v. Birmingham Transit Co.,** and **Flemming v. South Carolina Electric & Gas Co.** all involved community-service bus lines, while **Everett v. Riverside Hose Company No. 4** involved a local volunteer fire department. Is it reasonable, given the nature of the functions being carried out in all of these cases, that racial discrimination would be found permissible if the government theretofore or potentially involved had been canny enough to grant the land or the power to a discriminating "private" person with no strings attached?

There is certainly strong authority to the effect that the answer to that question is no. In **Smith v. Holiday Inns of America**, 336 F. 2d 630 (6th Cir. 1964), the defendant **purchased** land from a governmental authority. Such "controls" as the grantor-authority wrote into the contract of sale had no bearing upon the occupancy pattern of the defendant's motel, and were, in fact, nothing more than a local government, through zoning and building codes, could have imposed upon the defendant had the contract been silent. But the defendant-grantee's land was part of an extensive urban-redevelopment project, and he decided to discriminate racially in letting the rooms in his motel on that land. The Court said no. And it said no while fully cognizant of the difference between the case with which it was confronted, and those in which a continuing lease-hold relationship with a governmental agency existed, notably **Burton v. Wilmington Parking Authority**, *supra*. See 336 F. 2d 634-35. Why? **Because the motel was part of a governmental community project.** It was **not** that the property had once been owned by the government which was dispositive.

> We do **not** hold that the mere fact that a state agency once held title to a piece of property affects private title forever with some public quality. 336 F. 2d at 635 (emphasis in original).[21]

It was that the property was still being used to carry out a governmental purpose which counted.

> The single pervasive fact which defendants seek to ignore but which this court cannot is that this motel

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[21] It should be noted here that the reformulation argued for above might, in a few rare cases, serve to narrow the application of the equal-protection clause. If, for instance, a state acquired by foreclosing a tax lien the Polish-American Club building, and leased it to the Sons of Hellas, under the government-function (as opposed to the government-property) formulation, it is likely that the lessees would not be obligated to admit Turks or, presumably, Negroes, even if they were also Greek.

is part and parcel of a large, significant, and continuing public enterprise . . . 336 F. 2d at 634.

And finally, in 1966, this Court decided the case of **Evans v. Newton**, 382 U. S. 296 (1966). In that case a city, holder in trust of park land under a devise mandating use by white people only, allowed Negroes to use the park. Suit was brought to remove the city's trustees and appoint non-public ones. The city thereupon resigned as trustee. The state courts accepted that resignation and appointed private successor trustees. It was that action by the State courts which this Court reversed.

The premise of that reversal was that the state courts must have accepted the city's resignation, and appointed successor trustees, under the belief that such private trustees would be able to carry out the trust's segregating purposes, while the city clearly could not. See 382 U. S. at 302 and 382 U. S. at 303 (concurring opinion). Thus, the Court found it necessary to its decision to decide if indeed private trustees could constitutionally discriminate against Negroes in the operation of the park. And this Court decided that they could not, even though, with the substitution of the new trustees, **the city lost all property-law contact with the trust and the park.**[22] Integrating the meaning of **Marsh v. Alabama, Terry v. Adams, Burton v. Wilmington Parking Authority,** and **Public Service Comm'n v. Pollak** (all *supra*), this Court put its decision clearly and flatly on the ground that **there are some functions which are governmental functions no matter who it is in immediate charge of carrying them out.**

> The service rendered even by a private park of this character is municipal in nature. It is open to every

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[22] The Court did note that there was no evidence in the record that the City had ceased to provide care and maintenance to the park upon the appointment of substitute private trustees, but as there was no evidence to the contrary either, only brief attention was given to this evidentiary point. See 382 U. S. at 301.

white person, there being no selective element other than race. Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain . . .

. . . . . .

Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. 382 U. S. at 301-02.

We have been talking thus far about parks and beaches, buses and motels, **aspects** of a community, amenities in the life of a modern polis but peripheral to the heart of community life. **The instant case is about a community, a town, about public life itself.** When completed, Respondent's "town", access to which is denied Petitioners solely because of race, will house 1,000 people, and will be part of a larger complex of similar developments owned by Respondents which together will house 2,700 families. As **part** of this community there will be recreational facilities for golf, tennis and swimming. The streets will be open, and community-wide amenities like garbage collection will be communally provided. There will even exist the power to "tax" residents by levying assessments and collecting them judicially. Can an aggregation of power such as this, which in effect zones, polices, regulates and determines most of the important communal decisions for such a vast number of persons (see First Amended Com-

plaint, para. 8 (A. 9a-12a)) claim the right to discriminate against some persons solely on the ground of their color? If this power aggregate were politically chartered it could not. **Buchanan v. Warley,** 245 U. S. 60 (1917). If certain of the residents were given the power to decide whether or not to discriminate by voting on the question, that procedure would be impermissible. **Harmon v. Tyler,** 273 U. S. 668 (1927). If two or more residents of this "town" agreed with each other to discriminate racially, that agreement would be unenforceable. **Shelley v. Kraemer,** 334 U. S. 1 (1948). Is it possible that in this case, unlike **Marsh v. Alabama,** *supra,* ". . . the corporation's property interests settle the question" (see 326 U. S. at 504) and that **these** Respondents **may** racially discriminate? It seems unlikely.

It would be folly to pretend that the problems in this area are merely semantic, just the product of early juristic errors which have hardened into a clouded amber called "state action". Beneath the skin of that rubric lies the living heart of a painful paradox, a species of that generic conflict imbedded in the Constitution, the necessary clash between freedom and equality.[23] The wail of the householder—Why can't I sell my house to whomever I please? —is two parts pure racism and two parts pure fudge, but also, perhaps, one part mixed truth: every restriction upon property is a restriction upon personal freedom, and it is not necessarily un-American (certainly not historically) to resent such bondages, even if arguably for the common good. One should always keep in mind T. H. White's

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[23] The exquisite difficulty of the state-action question coupled with the pressing social importance of its "solution" has generated a massive outpouring of scholarly commentary on the doctrine. See the massive bibliography at 1965 **Duke L. J.** 222, n. 6, 231, n. 34. Among the most interesting articles directed to this issue since 1965 is Black, **"State Action," Equal Protection, and California's Proposition 14,** 81 **Harv. L. Rev.** 69 (1967).

great paradigm of what tyrannny is, the sign in the ant hill reading "Everything not forbidden is compulsory."[24]

But restrictions upon freedom are sometimes necessary; in a sense those restrictions **are** civilization. In the absence of any restrictions upon individual freedom, the life of man would most likely be "solitary, poore, nasty, brutish and short."[25] The essence of Anglo-American civilization is not, and cannot be, the absence of any restrictions upon perfect freedom, but rather the absence of any not requisite for the survival of decent and honorable communal life. That form of communal civilization cannot survive if vast aggregations of power are wholly free to impose their whims upon the less powerful. Thus, between government and man there can be no invidious discrimination. Nor can government lend its power (which includes its economic power) to any bloc, to tip the scales in its behalf. Nor even, in certain circumstances, may individuals consensually organize to discriminate by race, even if they but seek to do in concert what any single individual might do by and for himself. Nor (and this is critical) may any "person" with the *de facto* power and function of a *de jure* government do what that *de jure* government could not do.

Certainly it will be difficult to tell, sometimes, what is a community function and what is a private act. But it will often be very, very easy to do so. Consider for a moment the imaginary State of Neutrality, one of the states of the United States of America. Neutrality is a state which tends to husband its resources. It has no chartered municipalities, no police, no public schools, public housing, or public recreational facilities. It does not franchise or restrict common carriers or utilities. Neutrality, as a

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[24] **T. H. White, The Once and Future King** 122 (Dell Pub. Co. 1939).

[25] **T. Hobbes, Leviathan** 104 (Everyman ed. 1950).

state, meddles with no one. Naturally, the people of Neutrality have gotten together and set up schools, parks, swimming pools, bus lines, power companies and, of course, "housing developments"—none of which admit or give service to the minority class of Negroes in the State. I take it that on the position advanced by Respondents, those excluded Negroes would have no remedy under the United States Constitution with respect to **any** of those communal functions. And I further take it, that that is absurd. Those "private utilities", even unfranchised, would be "public utilities," and they could not racially discriminate. The "private police" would be just plain "police," and they could not decide to accept or protect only Whites. The schools, and maybe the pools, would be "public" too and covered by the Fourteenth Amendment. **And those "housing developments" would be towns, barred by the Constitution from discriminating on the grounds of race.**

Admittedly, questions grow closer in less hypothetical worlds. If, for instance, the "private" activity—school, pool, golf course—merely supplements rather than replaces governmentally (and non-discriminatorily) run facilities of the same sort, one might be inclined to allow the "private" group its discrimination, especially where this pattern of supplementation was historically justified (as seems clearly to be the situation in this country with respect to schools). And there would seem to be no reason to tamper with those organizations which are "communal" in only a very narrow sense, for instance the Sons of the Ukraine or the Daughters of Dublin, perhaps perforce ethnically limited but clearly "private" for all of that. In other words, most of the questions would be easy ones, albeit hard ones might remain, to be settled on a case-by-case basis.

But difficult as some of the questions one might think up could be, the question here, in **Jones v. Alfred H. Mayer**

Co., is not one of them. If the actions of a total community like the Respondents' is not "governmental" action subject to the strictures of the equal-protection clause, then **nothing** done by other than a *de jure* political organization or agent is subject to the Constitution. We submit that **such** a conclusion is neither Constitutionally credible, nor viable in today's America. To put it as this Court **has** put it, "Constitutional rights would be of little value if they could be thus indirectly denied." **Smith v. Allwright**, 321 U. S. 649, 664 (1944).

IN CONCLUSION.

For all the reasons set forth above, Petitioners urge that their Complaint states a cause of action upon which relief can be granted. The decision of the Court of Appeals for the Eighth Circuit should be reversed and the cause remanded to the District Court.

Respectfully submitted,

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January 18, 1968.

APPENDIX.

STATUTORY PROVISIONS QUOTED: CIVIL RIGHTS ACT OF 1866.

Act of April 9, 1866. 14 Stat. 27.

—An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

SEC. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalities on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime

whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to

the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

SEC. 4. *And be it further enacted,* That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons

charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offenses created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

SEC. 5. *And be it further enacted,* That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

SEC. 6. *And be it further enacted,* That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offenses, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

SEC. 7. *And be it further enacted,* That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioner for the arrest of

offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

SEC. 8. *And be it further enacted,* That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

SEC. 9. *And be it further enacted,* That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

SEC. 10. *And be it further enacted,* That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

CIVIL RIGHTS ACT OF 1870.

* * * * * * * *

SEC. 18. *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

* * * * * * * *

CIVIL RIGHTS ACT OF 1871.

Act of April 20, 1871. 17 Stat. 13.

An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon

error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

* * * * * * * *

SEC. 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offences heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

42 U. S. C., SECTION 1981.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and proeprty as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C., SECTION 1982.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C., SECTION 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SUPREME COURT, U. S.

JAN 18 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 645.

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

vs.

ALFRED H. MAYER COMPANY, a corporation,
ALFRED REALTY COMPANY, a corporation,
PADDOCK COUNTRY CLUB, INC., a corporation,
ALFRED H. MAYER, an individual, and an
officer of the above corporations,

Respondents.

BRIEF OF AMICUS CURIAE, THE PATH ASSOCIATION, IN SUPPORT OF PETITIONERS.

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BRIEF OF AMICUS CURIAE, THE PATH ASSOCIATION, IN SUPPORT OF PETITIONERS.

The PATH Association, with the consent of counsel for the petitioners and respondents herein, files this brief as *Amicus Curiae* in support of the position of Petitioners to reverse the judgment of the United States Court of Appeals for the Eighth Circuit below. 379 F. 2d 33 (1967). Information contained in this brief purports to indicate the adverse effect of racially restricted housing developments, such as that of Respondents herein, on the development of new housing units for and the accessibility of land and decent housing to the Negro living in the greater Cleveland community.

I. INTEREST AND POSITION OF AMICUS.

The PATH Association (PATH stands for Plan of Action for Tomorrow's Housing) is a broadly based citizens group organized in Cleveland, Ohio early in 1967 to take positive action in the field of housing in the greater Cleveland metropolitan community. It has the financial support of local residents and foundations, as well as the active participation of leaders in the Cleveland civic, governmental, business and social welfare communities. PATH is not primarily concerned with fair housing as such; rather, it aims to bring about action to provide decent housing in a suitable living environment for every Clevelander. But a thorough study and report of Cleveland housing circumstances has led PATH to the conclusion that it is not possible to reach this goal if there is continued racial discrimination and restriction in housing.

PATH supports the position of Petitioners that the import of the Civil Rights Act of 1866 and the Fourteenth Amendment to the United States Constitution, in accordance with the developing recent opinions of this Court interpreting their provisions, barred the sort of racially based private restrictions in housing and land development as indicated by the facts herein. This brief will not cite or repeat the arguments and authorities contained in Petitioners' brief other than to express support and agreement therewith. PATH hereby submits its data and findings from the Cleveland experience to demonstrate that such racial restriction acts to inhibit and deter development of decent housing for Negroes, which in turn is one of the most significant factors in producing the cultural, economic and educational deprivations which the Negro faces today in Cleveland and in other comparable large metropolitan areas of the United States.

II. PATH'S FINDINGS AND DATA AS TO CLEVELAND HOUSING PATTERNS.

PATH has found and publicly reported that Cleveland is one of the most racially segregated communities in the nation in housing.[1] Of Negroes in Cuyahoga County, Ohio, 90% live in Cleveland proper, almost all on the city's east side. Of Negroes living in Cleveland, 85% live in census tracts with at least a 70% Negro population; 50% of Negroes in Cleveland live in census tracts with a 95% or greater Negro population.

Growth of the Negro population of Cleveland occurred largely in the last half century. The number of non-whites in Cleveland in 1910 was 8,738; by 1960 this number was 253,108, and by 1965 it was 279,352. Meanwhile the white population of the City declined from 765,264 in 1950 to 622,942 in 1960, to 531,506 in 1965. Thus the percentage of non-whites in the City went from 1.6% in 1910, to 28.9% in 1960, to 34.5% in 1965.

The increasing need for housing which results from population increase is compounded for the Negro in Cleveland's "inner city" by aging and deteriorating housing conditions. Of the housing units in the City of Cleveland which were substandard (as defined by the U. S. Census Tract Classification) as of 1960, about 35% were occupied by Negro families. And almost all new, privately constructed housing in the City, meager as it is, is not available to Negro families.

The outward movement of the Negro population from the inner city has been almost solely to the east and the

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[1] Data and determinations of fact on the Cleveland situation as hereinafter reported are taken from the Report of The PATH Citizens Advisory Committee (March, 1967); Bureau of the Census—U. S. Department of Commerce, *Census of Population, Cleveland, Ohio*, 1910 through 1965; and the published studies of The Regional Church Planning Office, Cleveland, Ohio.

southeast. The movement has been for the most part into contiguous white neighborhoods so that concentration is enlarged into a single expanding pocket. The wave process is demonstrated by the experience of the Lee-Harvard area of Cleveland where in five years, from 1960 to 1965, the Negro population increased from about 12% to more than 50% of the area's total population.

A few Negro families have moved out of this expanding pocket, mostly into contiguous suburbs such as East Cleveland, Shaker Heights, and Warrensville Heights. However, Negro migration to the suburbs has not been important enough to reduce the housing pressures in the Negro community. While the Negro population in the suburbs increased by about 14,000 in the period from 1960 to 1965, the Negro population in Cleveland increased by about 26,000.

The trend of population migration in Cuyahoga County points up the present demographic features of the Negro housing dilemma. During the 1950-1960 period more white persons moved out of Cleveland each year than moved into the city and this accounted for much of the population growth in suburban Cuyahoga County. From 1951 through 1955 the net migration of whites into suburban Cuyahoga County was approximately equal to the net migration of whites *out* of Cleveland. Beginning in 1956, however, the net white migration from Cleveland began to exceed greatly the net white migration into suburban Cuyahoga County. This marked the beginning of the major spillover of the white Cleveland area population into the adjoining sections of the adjacent counties, which sparked a housing boom in the counties surrounding Cleveland's Cuyahoga County.

Beginning in 1959 a small number of Negroes joined whites in the exodus from Cleveland. This combined

migration out of the City of Cleveland continues to exceed the combined migration into suburban Cuyahoga County, with the result that more people move out of the county as a whole each year than move in. Significantly, during the 1959-1964 period, the Negro population of suburban Cuyahoga County increased by an average of nearly 2,000 persons per year, mostly as a result of an increased migration of Negroes from the central city to the suburbs. In 1965 to 1967, the increase in the Negro population of the same area averaged about 7,000 per year so that nearly one-third of the net migration from Cleveland to suburban parts of the county has been a Negro exodus from the central city, mostly moving to three main cities in the suburbs.

There would appear to be three basic reasons why the Negro is confined within limited areas of greater Cleveland: poverty, choice and racial discrimination. The strongest of these is racial discrimination resulting in the lack of accessibility to housing and land. Although poverty among many Negoes is common, the Negro still is forced to pay more for his inadequate housing in the inner city than the white person of comparable income who is not confined in his choice of housing. Although some Negroes are reluctant to leave the security of their friends, churches and social life in the inner city, there are others who nevertheless can afford to and do want to live in the suburbs but are prevented from doing so. Discrimination in housing touches at the core of the problem of our segregated society, for housing in turn affects the social relationships of the Negro, his employment opportunities, and the educational facilities available to his children.

III. CONSEQUENCES OF RACIAL RESTRICTIONS IN CLEVELAND.

Two clear consequences have resulted from the racial restrictions which have barred Cleveland Negroes from access to new housing and land development: first, new housing is not available so that Negroes are forced into over-crowded and restricted housing rather than into new construction open to whites; second, their opportunity for advancement and change is seriously restricted by the limited real estate market and poor housing environment.

—New Housing For Negroes Limited.

More than 200,000 people in Cuyahoga County live in substandard housing. Of the nearly 60,000 substandard dwelling units in the county, about seven-eighths are in the city of Cleveland. The migrating Negro, to the extent that he is able to find open housing, eventually moves into older and usually leased tenancies rather than into a home ownership situation. In the period between 1950 and 1967, about 30,000 new dwelling units were constructed in the central city as compared with about 150,000 units in the rest of the County. Today almost no new construction is available to Negroes in the central City.

But migration of the Negro to the suburbs has been for the most part into used housing accommodations. Only about 150 new houses have been built for Negroes in suburban Cuyahoga County since 1959. In that same period approximately 30,000 Negroes moved from the central city to the suburbs. Meanwhile, approximately 125,000 whites migrated from the central city, some moving into new home accommodations of approximately 10,000 units.

Details of the migration of white persons from Cleveland demonstrate a pattern by which new housing developments will bloom to accommodate white persons

and then wither in the face of increased Negro movements. It is clear that much of the demand for new housing in suburban Cleveland in recent years has resulted from the movement of white residents of Cleveland to the suburbs. When there was a large white migration from Cleveland to suburban Cuyahoga County a large building boom in suburban Cuyahoga County followed. But for the growing Negro migration from Cleveland to the suburbs in recent years, there is not an equivalent boom in new housing starts, partly because land and development projects are not available to Negroes. The pattern has been for Negro families moving from Cleveland to the suburbs to move into existing housing since new housing is reserved for whites. Unless Negroes are able to acquire new housing in the suburbs, Negro migration from Cleveland will not lead to new housing starts, regardless of the nature of the credit market.

At the same time that the private developer will not provide the necessary new housing accommodations for the Negro, the circumstances of racial restrictions and discriminatory attitudes resulting from this refusal reverberate to limit the effectiveness of a number of federal and local programs which have the purpose of increasing housing units in Cleveland. For example, no suburban communities have by ordinance permitted the construction of public housing accommodations in areas of Cuyahoga County outside of the city of Cleveland primarily because of opposition to Negroes in the public housing projects. This is in spite of the fact that the Cleveland Metropolitan Housing Authority is empowered to build county-wide.

Furthermore, in Cleveland by City ordinance leased public housing accommodations are confined only to active urban renewal projects. This makes the program highly ineffective because of the extremely deteriorated condition

of the accommodations in urban renewal areas. Once again, the purpose of this ordinance is to preclude Negroes from moving into white neighborhoods. Also the effectiveness of such programs as those undertaken under Section 221(d)(3) of the National Housing Act (providing below market loans for non-profit housing corporations) is seriously limited because practically these projects can only be built in substantially Negro areas.

—Restricted Housing Limits Negro Opportunities.

The net result of racial discrimination and restrictive practices in privately developed projects and the inability of public programs to acquire land and develop housing for Negroes outside of badly deteriorated areas is a continuation of the Negro ghetto. The Negro is contained in circumstances of cultural, economic, educational and social deprivation. The trend of inaccessibility to new housing is an ever-widening gap between the residents of the central city and the people living in suburbia.

Already nearly one-third of the residents of the central city are receiving public support benefits such as social security (130,000), veteran's disability or pension payments (40,000), public welfare (82,000), subsidized housing (27,000) and other programs. Cleveland is increasingly becoming the home of the poor, the powerless, the elderly, the crippled, the unemployed and the rejects of society while nearly all the members of the middle and upper classes live in the suburbs. These trends cannot be reversed to prevent this economic and social compartmentalization of the population of the Greater Cleveland area until there is a substantial increase in the supply of attractive middle class housing in the central city as well as suburban housing open to all.

In spite of the recent apparent increase in the Negro's economic capacity and desire to improve his living conditions, the free market place in available housing units does not operate to accommodate this demand. While the suburbs otherwise flourish economically, the Negro is barred from full participation. Thus housing restriction plays a major role in retarding the Negro advance to a full share in the benefits of American life.

The existence of an artificial real estate market prevents the free exercise by the Negro of choice of design, location and price in housing facilities. Such freedom would allow the processes of the open market to operate on the basis of economic capability. Otherwise, the Negro's increased economic power is useless and the value of his dollar is debased. Racial restriction in housing thus imposes an onerous economic and social penalty on the Negro just when the strongest efforts of the American government, courts and people are moving to provide full opportunity for the realization of Negro aspirations.

CONCLUSION.

For the foregoing reasons and in accordance with the arguments of Petitioners' Brief, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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No. 645

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

JOSEPH LEE JONES and BARBARA JO JONES,
Appellants,

vs.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporation,
Appellees.

BRIEF OF THE STATE OF MICHIGAN (CIVIL RIGHTS COMMISSION) AMICUS CURIAE

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Appellees.

BRIEF OF THE STATE OF MICHIGAN (CIVIL RIGHTS COMMISSION)

Interest of Amicus Curiae

The Civil Rights Commission of the State of Michigan files this brief amicus curiae pursuant to Supreme Court Rule 42 (4) which permits any "State, Territory, or Commonwealth sponsored by its attorney general" to file a brief amicus curiae without the consent of the parties.

The Michigan Civil Rights Commission is a constitutionally created agency of the State of Michigan. It is mandated by Article V, section 29 of the Michigan Constitu-

tion of 1963 to "investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination."

The Commission has recently argued before the Supreme Court of the State of Michigan that the Thirteenth Amendment to the United States Constitution and the federal statute at issue in this case (Civil Rights Act of 1866, 14 Stat. 27, codified at 42 U.S.C., section 1982) guarantee to a Negro citizen the right to acquire a house in a private subdivision free from discrimination because of race or color. The purpose of that argument was to support an order of the Civil Rights Commission, addressed to the developer, ordering him to cease and desist discrimination against a Negro citizen who had sought to purchase a lot and a home and against whom the developer had discriminated, by his own admission, because of that citizen's race and color.

Statement of the Case

Amicus adopts the statement of the case in the Brief of Appellants, Joseph Lee Jones and Barbara Jo Jones.

Questions Presented

The questions presented on pages 2 and 3 of Appellants' Petition for a Writ of Certiorari are as follows:

1. Whether the refusal of respondents, owners of residential developments, to sell a lot and house, otherwise on the market, to petitioners solely because of their race is prohibited:

A. Under the Civil Rights Act of 1866, enacted under the Thirteenth Amendment, or

B. Under the Civil Rights Act of 1866 as re-enacted in 1870 under the Thirteenth and Fourteenth Amendments, or

C. Under the terms of the Thirteenth and Fourteenth Amendments, aside from any federal statutes?

2. Whether the said discriminatory refusal to sell is unlawful, regardless of the existence or degree of state involvement?

3. Whether the state has sufficiently involved itself in the said discriminatory refusal to sell:

A. By its various intertwining acts with respondents, such as licensing, zoning, regulating, and otherwise promoting and assisting the respondents' development, or

B. By its delegation of municipal functions to respondents, or

C. By a combination of these factors so as to make said refusal unlawful?

While supporting the position of the Appellants on all of the questions presented, this brief will address itself solely to Question 1.

Summary of Argument

There is an inherent and fundamental right to acquire property.

The purpose of the Thirteenth Amendment was to secure fundamental rights to citizens of every race and color, including the right to purchase property, which historically was considered one of those fundamental rights.

The 1866 Statute was passed pursuant to Section 2 of the Thirteenth Amendment, and, like the Thirteenth Amendment itself: (1) applies to the actions of private persons, and (2) protects the right to acquire property free from discrimination by private persons because of race or color.

ARGUMENT

I

THE RIGHT TO ACQUIRE PROPERTY FREE FROM DISCRIMINATION BASED ON RACE OR COLOR IS GUARANTEED BY THE THIRTEENTH AMENDMENT TO THE CONSTITUTION AND THE CIVIL RIGHTS ACT OF 1866 PASSED PURSUANT TO THAT AMENDMENT

Prior to the Thirteenth Amendment, the right to purchase property was considered a fundamental right. As early as Blackstone, the right to acquire property was considered a civil right.

> "All property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities."
>
> Cooley's *Blackstone*, Vol. 1, Book II §299 (4th ed.).

The right to acquire and possess property was also con-

sidered a privilege of citizenship, protected by the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution, which reads as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

A leading exposition of what those privileges of citizenship are is *Corfield* v. *Coryell,* 4 Wash. C.C. 371, 6 Fed. Cas. 546, 551, Fed. Cas. No. 3230 (1823). The *Corfield* Opinion, written by Mr. Justice Washington, on circuit, has been quoted numerous times by this Court. (For instance, see *Slaughter House Cases,* 83 U.S. 36 (1873), and *Blake* v. *McClung,* 172 U.S. 240 (1898)).

Mr. Justice Washington wrote:

> "The inquiry is, what are the privileges and immunities of citizens in the several States? *We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental;* which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principals are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, *with the right to acquire and possess property of every kind,* and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. (at page 551) (Italics added).

Thus, the right to acquire property was considered a fundamental and basic right even prior to the passage of the Thirteenth Amendment.

The 13th Amendment to the United States Constitution was adopted in 1865 and reads as follows:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> "Section 2. Congress shall have power to enforce this article by appropriate legislation."

In 1866, shortly after the adoption of the Thirteenth Amendment and before the passage of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1866. Section I of that Act reads as follows:

> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, *to make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the con-*

trary notwithstanding." (Italics added)
14 Stat. 27 (1866).

The portion of that 1866 statute most relevant to this suit is presently found in *42 U.S. Code Annotated §1982,* which reads as follows:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

It is clear that the 1866 Act had its origin in the Thirteenth Amendment.

> "Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities. . . ." *Civil Rights Cases,* 109 U.S. 3, 22 (1883).

It is also clear that the Thirteenth Amendment and Statutes passed pursuant thereto apply to the discriminatory acts of private persons.

> "Under the 13th Amendment, the legislation, so far as necessary or proper *to eradicate all forms and incidents* of slavery and involuntary servitude, may be direct and primary, *operating upon the acts of individuals,* whether sanctioned by state legislation or not; . . ." (Italics added)

Clyatt v. *United States,* 197 U.S. 207, 217 (1905).

In *Civil Rights Cases,* 109 U.S. 3, 22 (1883) this Court stated that "fundamental rights which are the essence of

civil freedom" were intended to be protected by the Thirteenth Amendment and the Civil Rights Act of 1866. While this Court held at that time that the right to non-discriminatory treatment at places of public accommodation was not such a fundamental right, *it also ruled that the right to purchase property was such a fundamental right:*

> "Congress, . . . undertook . . . to *secure to all citizens of every race and color,* and without regard to previous servitude, *those fundamental rights which are the essence of civil freedom,* namely, the *same right* to make and enforce contracts, to sue, be parties, give evidence, *and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.*"
>
> *Civil Rights Cases,* 109 U.S. 3, 22 (1883). (Italics added)

This Court thereby made it clear that *private persons,* as well as the State, cannot deny to others *the right to purchase property because of race,* since the right to acquire property is a "fundamental right" which is the "essence of civil freedom".

The 1866 Act was "re-enacted" in 1870 after the passage of the Fourteenth Amendment (Section 18, 16 Stat. 144).

The re-enactment in 1870 simply emphasized that the act is also directed toward state action. (See *Buchanan v. Warley,* 245 U.S. 60 (1917)).

Both enactments dealt

> "with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."

Buchanan v. *Warley, supra,* at page 79.

In the case of *Corrigan v. Buckley*, 271 U.S. 323 (1926) this Court stated that the Statutes under consideration, including the 1866 Statute, "like the Constitutional *amendment* under whose sanctions they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." (at 331) (Italics added).

However:

1) The *Corrigan* case itself is ambiguous as to whether the Thirteenth or Fourteenth Amendment was being considered the basis of the Statute in question. The *Corrigan* Court referred to *one* Constitution amendment in the quotation above, not specifying whether it referred to the Thirteenth or Fourteenth amendment.

2) This Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948) viewed *Corrigan* as being a case determining whether the *Fourteenth Amendment* voided private discriminatory agreements (at page 8) and did not discuss *Corrigan* as reaching any result effected by the Thirteenth Amendment.

3) This Court, in *Shelley v. Kraemer, supra,* and *Hurd v. Hodge,* 334 U.S. 24 (1948) limited and undercut *Corrigan* by ruling that private discriminatory restrictive agreements are unenforceable in state and federal courts.

4) As noted in the *Shelley* case (at page 9), the appeal in *Corrigan* was dismissed by this Court for want of jurisdiction.

The 1866 Statute was re-enacted after the passage of the Fourteenth Amendment, and has, as a result, also been applied to State action. *Buchanan v. Warley,* 245 U.S. 60 (1917); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Hurd v. Hodge,* 334 U.S. 24 (1948). However, in none of those

three cases was the question raised whether the Statute in question also applied to individuals, *since in all three cases state action or judicial action was at issue.* Thus, any statement of the Court as to the requirement of state action under the 1866 Statute is dictum.

Amicus does not question the applicability of the Statute in question to state action since it was re-enacted after the passage of the Fourteenth Amendment. *The issue here,* however, is whether the Statute also applies to private action under the 1866 enactment pursuant to the Thirteenth Amendment. The Civil Rights Cases, 109 U.S. 3 (1883) clearly state that it does apply to such private action.

The case of *United States* v. *Morris,* 125 Fed. 322, (D.C., E.D. Arkansas 1903) is further authority for the propositions that the 1866 statute was passed pursuant to the Thireenth Amendment; that the right to acquire propery is a fundamental right; and that private interference with that right, based on racial grounds, is a violation of a right secured under the Constitution. The Court, in the *Morris* case, spoke as follows:

> "The language of the thirteenth amendment differs materially from that used in the two later ones. While the fourteenth amendment provides that 'no state shall make or enforce any law which shall abridge,' etc., and the fifteenth amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account,' etc., the thirteenth amendment declares, 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.' There is no limi-

tation in that amendment confining the prohibition tion to the states, but *it includes everybody within the jurisdiction of the national government. This distinction in the language of these amendments was fully recognized by the Supreme Court* in the Civil Rights Cases, 109 U.S. 3, 3 Supp. Ct. 18, 27 L.Ed. 835." (Italics added)

(at pages 323 and 324)

• • •

"Every citizen and free man is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are fundamental or natural rights, recognized among all free people."

(at page 325)

• • •

"Can there be any doubt that the right to *purchase, lease, and cultivate lands,* or to perform honest labor for wages with which to support himself and family, is *among these rights thus declared to be 'inherent and inalienable'?*"

(Italics added) (at 326)

• • •

"In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, *as a denial of such privileges is an element of servitude within the meaning of that amendment.*" (Italics added)

(at page 330)

The *Morris* case is a most significant one for this litigation. Interference with a Negro's right to acquire property was held therein to be a violation of the 1866 Statute and the Thirteenth Amendment.

The 1866 Statute and the Thirteenth Amendment should be interpreted by this Court to carry out the clear public policy against racial discrimination.

Constitutional provisions, and statutes, should be construed in light of public policy:

> "The only question for determination is whether this colony is such Indian country. In this inquiry, both the legislative history of the term 'Indian country' and the *traditional policy* of the United States in regulating the sale of intoxicants to Indians are important." (Italics added)
>
> *United States* v. *McGowan*, 302 U.S. 535, 536 (1938).

There is a clear public policy in the United States against racial discrimination and, in particular, against discrimination in housing.

This Court has spoken as follows:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river."

Berman v. *Parker,* 348 U.S. 26, 32 (1954).

The President of the United States, in Executive Order No. 11197 (February 5, 1965), stated that:

> "(D)iscrimination on the ground of race, creed, color, or national origin is contrary to the constitutional principles, laws, and policies of the United States."
>
> Reprinted at 10 *Race Relations Law Reporter* 940 (1965).

The Supreme Court of Michigan in 1890, held that:

> "Any discrimination founded upon the race or color of the citizen is unjust and cruel, ..."

Ferguson v. *Gies,* 82 Mich. 358, 365 (1890).

The Supreme Court of Washington has described the public policy, which stands opposed to the evils of discrimination, as follows:

> "This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social, economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with substandard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to insta-

bility in family life, moral laxity, and delinquency. It can and must be eliminated, ..."

O'Meara v. *Board Against Discrimination*, 58 Wash. 2d 793, 365 P. 2d 1, 3 (1961).

Other courts have reached the same conclusion:

"Historically, racial, religious and national prejudices which show themselves in a variety of overt forms of discrimination, have been the subject of major concern to government on a federal, state and local level. It is a well recognized fact that discrimination in housing, as an evil cannot be distinguished from the evils of discrimination in education and business.

"The problems born of discrimination in housing, particularly against Negroes, are particularly acute."

New Jersey Home Builders Association, et al. v. *Division on Civil Rights*, 81 N.J. Super. 243, 195 A. 2d 318 (1963).

". . . segregation and discrimination not only denote inferiority of the class discriminated against, but also retard the development of that class. . . ."

Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio E.D. 1967)

Also see:

Abrams, *Forbidden Neighbors*, Harper & Bros., 1955;

Commission on Race and Housing, *Where Shall We Live?*, University of California Press, 1958;

Glazer and McEntire, *Studies in Housing and Minority Groups,* University of California Press, 1961;

Greenberg, *Race Relations and American Law,* Columbia University Press, 1959;

McEntire, *Residence and Race,* University of California Press, 1960;

Robinson, "Housing, the Northern Civil Rights Frontier", 13 *Western Reserve Law Review* 101, 1961;

United States Commission on Civil Rights, *Housing Report,* 1961;

Weaver, *The Negro Ghetto,* Harcourt, Brace & Co. 1948.

Thus, the public policy in the United States against racial discrimination in housing is clear, and the Thirteenth Amendment and the 1866 Statute should be interpreted in light of that policy.

There is much precedent in the common law for courts limiting dispositions of property for compelling social reasons.

It is almost always true that when rights are enforced (and duties created thereby), other rights are thereby limited.

> "(N)either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

Nebbia v. *New York*, 291 U.S. 502, 523 (1934).

Also see the concurring Opinion of Mr. Justice Frankfurter in *Marsh* v. *Alabama*, wherein he wrote:

> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . ." (at 505)

Marsh v. *Alabama*, 326 U.S. 501 (1946).

Courts, for centuries, have limited the right of disposition of property for compelling social reasons. Professor Richard R. B. Powell, *reporter for the American Law Institute's Committee on Property*, has set forth numerous areas where courts have created limitations on property disposition:

> "The power to dispose of owned assets has been outstandingly cut down by
>
> (a) the Rule Against Perpetuities;
>
> (b) the law on unlawful restraints on alienation;
>
> (c) the general law barring illegal or anti-social dispositions; and
>
> (d) the insistence upon formalities as prerequisites for full efficacy.
>
> "Beginning in the late seventeenth century, the Rule Against Perpetuities took final form after a gestation period of a century and a third as a *magnificent judicially manufactured ingredient* of the law designed to curb 'inconvenient' lessenings of the alien-

> ability of property and thus to curb the power of the dead hand to rule the future. It placed outer limits of time on the power of the too often assumed all-wisdom of present owners. Dispositions designed to take effect too far into the future became barred because of the recognized undesirable social consequence of permitting them." (Italics added)
>
> Powell, "The Relationship between Property Rights and Civil Rights", 15 *Hastings Law Journal,* 135, 140 (1963).

Thus, there is support in the common law for limiting dispositions of property for compelling social reasons.

There is also support in the common law for the proposition that there is a civil right to purchase property free of racial discrimination.

In this regard, see the recent case of *Colorado Anti-Discrimination Comm.* v. *Case,* 151 Colo. 235, 380 P. 2d 34 (1962), the Supreme Court of Colorado, while affirming the constitutionality of a Colorado fair housing statute, indicated that *even in the absence of a statute, the Court would "fashion a remedy" for the violation of the right to acquire property, where the right to acquire has been fettered and frustrated by discrimination based on race, creed or color*:

> *"It is the solemn responsibility of the judiciary to 'fashion a remedy' for the violation of a right which is truly 'inalienable' in the event that no remedy has been provided by a legislative enactment.* An inherent human right will be upheld by this court against action by any person or department which would destroy such a right or result in discrimination in the manner in which enjoyment thereof is to be permitted as between

persons of different races, creeds or color."

(at page 40), (Italics added).

The Court continued:

> "We hold that as an unenumerated inalienable right a man has the *right to acquire one of the necessities of life, a home for himself and those dependent upon him, unfettered by discrimination* against him on account of his race, creed or color."
>
> (Italics added) (at page 41).

CONCLUSION

The Thirteenth Amendment guarantees the protection of fundamental rights to United States citizens, including the right to acquire property. The 1866 Statute passed pursuant to the Thirteenth Amendment specifically guarantees citizens the right to acquire property against private persons who discriminate because of race or color.

Respectfully submitted,

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Lansing, Michigan
January 16, 1968

SUPREME COURT, U. S.

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ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents.

BRIEF OF NATIONAL JEWISH ORGANIZATIONS AND REPRESENTATIVE LOCAL JEWISH COUNCILS

(Affiliated with the National Community Relations Advisory Council)

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IN THE

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents.

BRIEF OF NATIONAL JEWISH ORGANIZATIONS AND REPRESENTATIVE LOCAL JEWISH COUNCILS

(Affiliated with the National Community Relations Advisory Council)

AMICI CURIAE

Interest of the *Amici*

This brief is submitted on behalf of the following national Jewish organizations:

American Jewish Committee
Jewish Labor Committee
Jewish War Veterans of the U. S. A.
National Council of Jewish Women
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
United Synagogue of America

and 81 representative local Jewish councils, covering the major cities in the United States.*

* Local, State and County Agencies: Jewish Welfare Fund of Akron; Albany Jewish Community Council; Atlanta Jewish Community Council; Federation of Jewish Agencies of Atlantic County, N.J.; Baltimore Jewish Council; Jewish Community Council of Birmingham; Jewish Community Council of Metropolitan Boston; Jewish Community Council, Bridgeport, Conn.; Brooklyn Jewish Community Council; Jewish Federation of Broome County, N.Y.; Community Relations Council of Camden County, N.J.; Jewish Community Federation, Canton, Ohio; Jewish Community Relations Committee of Charleston, S.C.; Cincinnati Jewish Community Relations Committee; Jewish Community Federation, Cleveland, Ohio; United Jewish Fund and Council, Columbus, Ohio; Connecticut Jewish Community Relations Council; Jewish Community Council of Dayton; Jewish Federation of Delaware; Jewish Community Council of Metropolitan Detroit; Eastern Union County, N.J., Jewish Community Council; Jewish Community Council of Easton and Vicinity; Jewish Community Welfare Council, Erie, Pa.; Jewish Community Council of Essex County, New Jersey; Jewish Community Council of Flint, Mich.; Jewish Federation of Fort Worth, Tex.; Community Relations Committee of the Hartford (Conn.) Jewish Federation; Jewish Community Council of Metropolitan Houston (Tex.); Indiana Jewish Community Relations Council; Indianapolis Jewish Community Relations Council; Jewish Community Council, Jacksonville, Florida; Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City; Kingston, N.Y., Jewish Community Council; Jewish Community Council of Long Beach, Cal.; Community Relations Committee of the Jewish Federation Council of Greater Los Angeles; Conference of Jewish Organizations of Louisville; Jewish Community Relations Council of Memphis; Milwaukee Jewish Council; Jewish Community Relations Council of Minnesota; Nashville Jewish Community Council; Jewish Federation of New Britain, Conn.; New Haven Jewish Community Council; Jewish Community Council of Newport News, Va.; Norfolk Jewish Community Council; Jewish Community Relations Council for Alameda and Contra Costa Counties, Oakland, Calif.; Central Florida Jewish Community Council (Orlando); Jewish Federation of Palm Beach County; Jewish Community Council of Paterson, N.J.; Jewish Community Council of Peoria, Ill.; Jewish Community Council, Perth Amboy, N.J.; Jewish Community Relations Council of Greater Philadelphia; Jewish Community Relations Council, Pittsburgh; Jewish Community Council of the Plainfields, N.J.; Jewish Federation of Portland, Me.; Community Relations Committee of the Jewish Welfare Federation of Portland, Ore.; Jewish Federation of Raritan Valley, N.J.;

The organizations are affiliated with the National Community Relations Advisory Council, a coordinating body.

The organizations joining in this brief include in their membership the overwhelming majority of Americans affiliated with Jewish organizations.

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans.

They are therefore deeply concerned with the issues and outcome of this case. One of their primary purposes is to cope with racial and religious prejudice in the United States through the elimination of discrimination against racial, religious and ethnic groups comprising the American population. These organizations believe that the welfare of Jews in the United States is inseparably related to the extension of equal opportunity for all. Discrimination in housing against members of any racial, religious or ethnic group, therefore, is a threat to all groups and to the individual members thereof.

Richmond Jewish Community Council; Jewish Community Council, Rochester, N.Y.; Sacramento Jewish Community Relations Council; Jewish Community Council of St. Joseph County, Ind.; Jewish Community Relations Council of St. Louis; Community Relations Council of San Diego; San Francisco Jewish Community Relations Council; Jewish Community Council of San Jose, Cal.; Jewish Council of Savannah, Ga.; Jewish Community Council, Schenectady, N.Y.; Scranton Lackawanna Jewish Council; Jewish Federation of Springfield, Ill.; Jewish Community Council of Springfield, Mass.; Syracuse Jewish Welfare Federation; Jewish Welfare Federation of Toledo; Jewish Federation of Trenton; Tucson Jewish Community Council; Tulsa Jewish Community Council; Jewish Community Council, Utica; Jewish Community Council of Greater Washington; Jewish Federation of Waterbury; Wyoming Valley Jewish Committee, Wilkes-Barre, Pa.; Jewish Federation of Worcester, Mass.; Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio; Jewish Welfare Federation of Des Moines, Iowa.

Statement of the Case

There is no dispute concerning the essential facts in this case. The petitioners, Joseph Lee Jones and his wife, Barbara Jo Jones, sought to purchase real property in a residential development operated by the respondents. They selected a lot and offered to pay the advertised price to have a house built upon it. For the sole reason that Mr. Jones is a Negro, their offer was rejected.

The residential development in question, Paddock Woods, is a subdivision of more than one hundred projected homes which are being erected with conventional mortgage financing. No guarantees of any kind are provided either by the Federal Housing Administration or by the Veterans Administration, nor is there any other direct governmental assistance to this enterprise. The development does, however, furnish its inhabitants with such quasi-governmental services as streets, playgrounds and a garbage collection system. Moreover, it is clear that the State of Missouri, its political subdivisions, and their various agencies are involved indirectly in this residential venture to the extent that they have imposed zoning laws, building codes and licensing requirements which affect the respondents and their agents.

In substance the petitioners assert that both the Civil Rights Act of 1866 (in its present codification, 42 U.S.C. §1982) and the Fourteenth Amendment establish their right to purchase property without discrimination, and that this right is enforceable regardless of whether or not "state action" is involved. They therefore seek both damages and mandatory injunctive relief. The respondents

contend, to the contrary, that "state action" must be present for the petitioners to prevail, and that the allegations of the petitioners fail to establish the existence of this requisite.

The United States District Court for the Eastern District of Missouri dismissed the complaint for failure to state a cause of action on the ground that §1982 is subject to the strictures of the Fourteenth Amendment, which is applicable to the states but not to private citizens. The District Court ruled that there was insufficient "state action," on the facts of this case, to invoke the Fourteenth Amendment.

On appeal to the Court of Appeals for the Eighth Circuit, the decision of the lower court was affirmed. While evincing sympathy in its opinion for the cause asserted by the petitioners, the Circuit Court declared itself impelled, as an inferior tribunal, to follow the prior pronouncements of this Court which were deemed to be binding upon it. This Court has consented to hear the case.

Summary of Argument

Section 1982 of Title 42 of the United States Code provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This provision originated in the Civil Rights Act of 1866. Subsequently it was reenacted as part of the Civil Rights Act of 1870.

The language of Section 1982 is unambiguous. If this provision is not enforceable by a citizen, then obviously it asserts a right for which there is no remedy. It thus becomes a meaningless appendage, a statute which ordinarily would be vital, but instead is a dead letter.

This brief will not address itself to the early history of Section 1982, nor to its relationship with the Thirteenth or Fourteenth Amendments, nor to the abundant case law which could be cited with reference thereto. We learn that other briefs which either have been already filed with this Court, or shall be filed shortly, will be devoted to these questions in great depth and detail.

Rather, it will be the purpose of this brief to delineate the impact of widely practiced housing discrimination today upon the American body politic, generally, and upon minority group members particularly. We will endeavor to show that this impact has been tragic and far reaching, and that judicial redress by means of Section 1982 is imperative. Since no judicial decision is rendered in a social vacuum,[1] the ugly realities of the consequences of segregated housing should be relevant to the ultimate outcome of this case.

* * * * *

The brief opens with an appraisal of the impact of housing discrimination against people of the Jewish faith.

Its main thrust, however, is devoted to the consequences of housing discrimination against Negroes, which poses by

1. "Good laws are laws congruent to the needs of people in a given time and place;"—Edmund N. Cahn, Professor of Law, New York University in *The Sense of Injustice* (p. 106), New York University Press (1949).

far the more serious problem. After describing the conditions of life in the Negro ghettos, the brief confronts the relationship between segregated housing and job opportunities, the relationship between segregated housing and public school segregation and, finally, an array of other disabling effects that are produced and perpetuated by such involuntary residential isolation.

It next assesses the causes of Negro housing segregation, concluding with a determination that an effective federal open housing law is a necessity.

ARGUMENT

I

Housing Discrimination Directed Against Members of the Jewish Faith

The historical account of housing discrimination in the U.S. would not be complete unless mention, however brief, is made of the early and even contemporaneous experiences of American Jews—especially in the larger cities. Thus, since this brief is submitted in behalf of an aggregation of Jewish organizations, it is appropriate that it launch itself with a discussion of the impact of housing discrimination upon Jews. In doing so, it not only relates the American Jewish community to the complex problem of discrimination itself, but also reflects an authentic identification of members of the Jewish faith with the proliferated problems of discrimination confronting the American Negro.

Among the early restrictive covenants that ran with the land in many states and, with a few variations, were largely

complied with by those in the chain of title to that land, was one that provided as follows:

> "No part of the land hereby conveyed shall ever be used, or occupied by, or sold, demised, transferred, conveyed unto, or in trust for, leased, or rented, or given, to Negroes, or any person or persons of Negro blood or extraction, or to any person of the Semitic race, blood, or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians * * *"[2]

In the first part of this century, and for many years thereafter until recently, housing discrimination directed against Jews was fairly commonplace. It was primarily concentrated in urban centers. In the report of a study of Jewish life in the United States, conducted by John Higham, Professor of Sociology at the University of Michigan,[3] examples are offered of modes of both covenanted and uncovenanted housing discrimination:

> "Already at the turn of the [20th] century a great stream of humanity was crossing from the Lower East Side of New York into Williamsburg, Greenpoint, and Brownsville. The older Brooklyn settlers took so unkindly to the newcomers that the latter established a Jewish Protective Association in 1899 to spur civil action against Jew-beating rowdies. Another sizable colony formed in Harlem. As it expanded, many a land-

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2. This covenant, approximately as quaintly phrased, appeared in the famous Miller deeds in the Washington, D.C. area. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948) rendered these covenants unenforceable, but held they might be complied with by the parties voluntarily.

3. "Social Discrimination Against Jews, 1830-1930" (Publication of the American Jewish Historical Society), Vol. XLVII, No. 1 (September, 1957).

lord in the area hung out a "to-let" sign bearing the warning "No Jews."

"'During the 1900's, also, Boston Jewry broke out of the tenement districts around the harbor and pressed southward, with consequences much the same. As the migration descended upon the middle-class suburbs of Dorchester and Roxbury, home-owners either fled or resorted to restrictive covenants. In Roxbury a mass meeting of Jews demanded more adequate police protection against hooligans. Real estate agents in both areas refused to rent apartments to Jews; and often their neighbors' unpleasant behavior forced Jews to vacate newly acquired homes."

It is a melancholy fact that yesterday's housing discrimination against Jews, while by no means the grievous problem on a mass scale comparable to that to which nonwhites are exposed, still exists throughout the country. Numerous pockets of residential communities yet will not accept Jews as owners or lessees of real property. While in the most general terms Jews are now, after generations of systematic exclusion, free to live almost anywhere their economic status permits, and it is rare to find a Jew whose life situation is presently irreparably damaged solely because of dwelling exclusion, nevertheless the American Jew must indeed feel deeply aggrieved by such examples of rejection as yet persist, a rejection that represents a genuine affront to his sense of personal dignity. While it no longer serves to imprison him, as often it once did, in an intolerable residential predicament, to the extent that Jews are still barred from living wherever they choose, as members of other religious groups may, the very act of exclusion serves as a means of humiliation, imposed only because of a particular religious affiliation.

This may occur in places as widely disparate as Delray Beach, Fla.[4] and Bronxville, N.Y., or in a number of suburban areas of the District of Columbia, or in respect of an application to purchase a cooperative apartment in certain sections in New York City.[5] Such practices, still stubbornly pursued, must be noted as bearing upon the problem to which we address ourselves; they symbolize the still existing remnants of an earlier era in this country's history which now and again mirror its chronic, collective inhospitality to certain racial, religious and ethnic groups.[6]

The frequently absurd examples of residential discrimination against Jews perhaps have never been more graphically illustrated than by the disclosure in the press[7] of the "point" system which, as recently as 1960, was being used to screen prospective residential purchasers in Grosse Point, Michigan, once described as "the boudoir of Detroit." Each would-be buyer in that community was graded by means of a questionnaire, conceived by the local realty board, which was completed by a private detective. Out of a maximum possible arbitrary 100 points, a Jew, to qualify for residential admission to the community, was required (by means of a quaint system of scoring) to score 85. A

4. Statement of Eugene L. Sugarman, Chairman, New York Regional Advisory Board, Anti-Defamation League of B'nai B'rith to U. S. Commission on Civil Rights, February 3, 1959, New York, N. Y., 411. (U. S. Government Printing Office, Washington: 1959.)

5. Statement of Irving M. Engel, President, American Jewish Committee to U. S. Commission on Civil Rights, February 3, 1959, New York, N. Y., 395, 396 and 402. (U. S. Government Printing Office, Washington: 1959.)

6. *Viz.*, The national origins quota system enacted as part of the McCarran-Walter Immigration Act, 8 U.S.C.A. §1101 *et seq.* (1952).

7. *The New York Times,* April 20, 1960.

person of southern European extraction, however, could pass with 75, and a Pole with but 55 points. Negroes and Orientals were not eligible to take the test.[8]

The grading scheme contained a number of other bizarre features. A Jew with an Anglo-Saxon name, for example, would receive two points, whereas a classic Jewish name was worth zero. Indeed, a special "Blue Form" was introduced explicitly for the purpose of evaluating Jewish applicants, allowing only three points for a Jew who dressed conservatively, though a non-Jew would be awarded four points for the same sartorial attribute. A local Congregational minister wryly observed that Jesus Christ, a carpenter of "swarthy" complexion (swarthiness too being deemed undesirable), "would have failed the test."[9]

The whole process would have been simply ludicrous, had it not been so odious.[10] It has since been discontinued, as a result of governmental agency pressure.

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8. *Time* Magazine (April 25, 1960) in an item entitled "Grosse Pointe's Gross Points" commented: "What makes neighboring Detroiters smile about the carefully protected Grosse Pointe exclusivity is that the area's permanent, well-established residents somehow included such noted Detroit gangsters as Mathew Rubino (20 arrests), Peter Licavoli (24), and John Priziola (17).

9. *Rights*, September, 1960 (Report by Anti-Defamation League of B'nai B'rith, on discrimination).

10. One illustration of how the system operated in practice was furnished by a letter received by the Attorney General of Michigan which read, in part, as follows:

> "My dealings were with Mrs. Irene Bledsoe and Mr. De Santis of Johnstone & Johnstone, Grosse Pointe. When I asked to make a bid on a house, I was told by Mr. De Santis that I must await being passed by the Grosse Pointe Property Owners Association. This took several weeks, I was told then by Mrs. Bledsoe that I could not buy or even look at a house in Grosse Pointe because I was Jewish and could not qualify. I will not

Since the common forms of overt anti-Semitism appear to be somewhat out of fashion, such discriminations as are yet manifested against Jewish applicants for living accommodations frequently are devious. The resultant pattern which has emerged has been described as follows:

> "The Jewish home seeker will frequently find the real estate agent to be amazingly without homes to show him. Sometimes a real estate agent will go beyond this by telling the Jew that he doesn't think he will be 'comfortable' in the area, explaining that there are no Jews living in the vicinity, no temples or synagogues in the immediate vicinity, or that the people in the area are unfriendly towards Jews. He will recount the many experiences he has had where Jews disregarded his advice and had to put their newly purchased home on the market again because of the hostility and social ostracism they experienced. If the Jewish home seeker

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belabor the point with needless detail, but I think some details of personal biography might be of interest in the light of my being disqualified.

"First of all, I am half Jewish and my wife is not Jewish at all. It was told by Mr. De Santis, incidentally, that she qualified and could move to Grosse Pointe. I forgot to ask them about my two-year-old son. We are all native born citizens, light complexioned and without accent. My wife is a scholarship alumna of Cranbrook Academy. The half lineage which is not Jewish in myself is from my mother. She is a Braxton. She is a direct descendant of Carter Braxton who signed the Declaration of Independence. I was raised in Detroit and am a *cum laude* graduate of Wayne University. I am the inventor of the artificial electrical heart and have contributed this invention without recompense to the community. I am a member of Sigma Xi, the national honorary research society. I am the author of many scientific articles in Medicine and am honored to be the recipient of four national medical awards. I am Instructor at Wayne State University College of Medicine for which I accept no salary * * * I hope my personal experience can be of some use to you * * * I could go on but I think my point is clear * * *

Sincerely,

Jean Braxton Rosenbaum, M.D."

persists, the home for sale will unaccountably be withdrawn from the market, or, he will then be told flatly that with respect to the home, the owner has issued express instructions not to sell to Jews." [11]

Although the thrust of housing discrimination directed against Jews is certainly not a problem of the gravity which has confronted Negroes, it has nevertheless served as the central component of a design of economic, political and social discrimination which, as a totality, seeks to impose upon Jews a not-too-subtle badge of rejection and inferiority, i.e., the inscription on the badge seems to read: it is obviously more advantageous to be Christian than Jewish.

II

Effect of Housing Discrimination Upon Negroes

Nearly every ancient restrictive covenant or other modern device directed at Jews as targets of bigotry has included the Negro as an intended fellow-victim. But whereas housing discrimination against Jews presently embodies social insult rather than enduringly critical injury, with respect to Negroes the damage has been infinitely worse; it is beyond comparison!

It is difficult to characterize adequately the conditions which prevail in urban Negro ghettoes without seeming to resort to hyperbole. The stark truth is that, where housing is concerned, most Negroes in America today are compelled to reside in *de facto* concentration enclaves, with no escape in prospect. The civil disorders which have ravaged our cities in recent years convey their own frightful message.

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11. "Housing Barriers Against Jews," A. Abbott Rosen, *New City*, August 1, 1963 (Catholic Council on Working Life).

Since massive disturbances of this nature do not ordinarily occur, absent profound social grievances, these disorders establish a clear and compelling case of *res ipsa loquitur*. To the extent that words spontaneously uttered may nonetheless be helpful, ghetto inhabitants have described their own plight simply, yet perhaps more eloquently than is otherwise possible:

> "When they have to get out on the street at 14 or 15 they consider themselves to be a man and are going to take on some responsibility because he is the only man in the house and he has little brothers and sisters going hungry, half starving and trying to get the rent in. It is a bare house, like it is a cold feeling even to be there and you have to go out on the street and become the subject of the same thing out there. There has to be a breaking point."[12]

A Negro woman from a slum in Gary, Indiana, Mrs. Jacqueline Taylor, expressed her feelings about her life in this manner:

> "I mean outside of this district time marches on. * * * They build better and they have better but you come down here and you see the same thing year after year after year. People struggling, people wanting, people needing, and nobody to give anyone help."[13]

In response to a question as to what she would do if she had sufficient income, another resident of the same city, Mrs. Charlotte Gordon, replied:

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12. Hearing before the U. S. Commission on Civil Rights, San Francisco, Calif., May 1-3, 1967, and Oakland, Calif., May 4-6, 1967, p. 284. (U. S. Government Printing Office, Washington: 1967.)

13. Proceedings before the Indiana State Advisory Committee to the U. S. Commission on Civil Rights in Gary, Ind., Feb. 8, 1966, p. 42. (U. S. Government Printing Office, Washington: 1966.)

> "The first thing I would do myself is to move out of the neighborhood. I feel the entire neighborhood is more or less a trap. If you check back and check the people on welfare now, nine times out of ten they are people that have been on welfare before. * * *"[14]

Mrs. Rowena Stewart, who lives in the South End of Boston, commented graphically on the housing situation in her neighborhood:

> "A person rents a broken-down room for $21 to $24 a week that is rat infested and has cockroaches running all over the place. There are holes in the ceiling where the plaster has fallen down and the people have to share a bathroom. The so-called furnished apartments usually contain a few chairs, a table and an old rusty bed. * * * Frequently, social workers tell families to move out of these homes where the rents are too high, but they never find them decent homes where rents are lower."[15]

The problem of rats in the Hough area of Cleveland was described by one of its residents, Mrs. Hattie Mae Dugan:

> "I was living in one apartment, the rats got in bed with me, and my sister is still living in the same building and the rats are jumping up and down. The kids, they play with rats like a child would play with a dog or something. They chase them around the house and things like this."[16]

The inventory of the hideous conditions and of the concomitant anguish and despair in the Negro ghettos is

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14. *Ibid.* at 29.

15. The Voice of the Ghetto, Report on Two Boston Neighborhood Meetings p. 16. (Massachusetts State Advisory Committee to the U. S. Commission on Civil Rights, Boston, Mass.: 1967.)

16. Hearings Before the U. S. Commission on Civil Rights, Cleveland, Ohio, April 1-7, 1966, p. 25. (U. S. Government Printing Office, Washington: 1966.)

seemingly endless. But what happens when a Negro attempts to emerge from the ghetto into a more physically congenial neighborhood? The experience of a Negro journalist is illuminating:

> "I remember—more vividly sometimes than I wish—my family's experiences as the single Negro family on an otherwise all-white street in a Southwest Atlanta neighborhood. I remember the first night—the sound of gunshots fired above the house, the sight of cherry bombs and Molotov cocktails tossed on the lawn. I remember returning home with my wife and two children after a short trip to the city to find windows broken and streams of toilet paper decorating the front yard. I remember the sight of my trembling teenage daughter telling her mother and me of an attempt by a white teenage motorist to run her down as she walked along the road from school. I remember the words of my six-year-old son telling us of being chased by larger white boys. 'I wish I was white so they wouldn't do it.' It is not possible to erase such memories.
>
> "When I first sought a home in Atlanta in the summer of 1965, I talked by telephone with white real estate agents, sometimes asking them about specific houses I knew were vacant. Not knowing they were talking to a Negro, some of the agents advised me against considering homes in certain so-called 'fringe' areas because, as they put it, 'the niggers have started moving in there.' After seeing me, these realtors would either refer me to Negro real estate firms or to white firms which sold and rented property in Negro areas. Often white agents candidly told me that they did not handle property for Negroes.
>
> "The role of white realtors in promoting segregated housing is thus easily seen. The part Negro realtors play is less obvious perhaps because they are victims of the system perpetuated by whites. One Negro realtor

> interviewed in connection with this article said that when a group of whites attempting to maintain racial balance in their neighborhood asked him to cooperate by discouraging further Negro purchases in the area, he refused because he believes in open occupancy. But in the absence of a federal open occupancy law permitting Negroes to live wherever their financial resources permit and thus discouraging the migration of race-conscious whites seeking lily-white neighborhoods, the practical result of his refusal will be to help bring about total transition of the neighborhood, in other words, to perpetuate segregation."[17]

In this connection, the respondent, Alfred H. Mayer, is quoted as having commented to a reporter for the *St. Louis Globe-Democrat* last October that "the sooner an open housing policy is everywhere, the better."[18] His rationale, apparently, was that it was difficult for one developer not to discriminate against Negroes so long as other local developers discriminated, because of the need to remain successfully competitive.

In cities throughout the North there has been a continuing influx of rural Negroes from the South, and a simultaneous flight of urban northern whites to the suburbs surrounding the inner cities. As Negroes move into a city neighborhood, whites move out.[19] This process, in itself, would be damaging enough to the prospect for an

17. "Blueprint for Segregation: A Survey of Atlanta Housing," S. L. Adams, *New South,* Spring, 1967 (Southern Regional Council, Atlanta, Ga.).

18. *The National Observer,* December 4, 1967.

19. "An American Dilemma" (Twentieth Anniversary Edition), p. 263, Dr. Gunnar Myrdal, Professor of International Economy, University of Stockholm, Harper & Row (1962). See also: "The White Exodus to Suburbia Steps Up," by Herbert J. Gans, a sociologist on the faculty of Teachers College, Columbia University, *New York Times Magazine,* January 7, 1968, p. 25.

integrated society.[20] But it is markedly exacerbated by the behavior of real estate brokers who affirmatively foster neighborhood segregation.[21] Charles Abrams, a nationally known housing authority, in his book entitled "Forbidden Neighbors," listed thirteen different methods whereby realty groups have endeavored to perpetuate discrimination, subsequent to and designed to evade the implications of the decision of this Court in *Shelley* v. *Kraemer, supra.*[22]

It has been suggested that the behavior of the real estate fraternity, in restricting the sale or rental of property on the basis of race and religion, constitutes a conspiracy to restrain trade in violation of the U.S. anti-trust laws.[23] Indeed, Recommendation 6 of the Report by the U. S. Commission on Civil Rights, in 1962, urged that the President request the Department of Justice to investigate whether such anti-trust violation was actually occurring in the Washington metropolitan area.[24]

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20. "The middle-class Negro is frequently the most bitter Negro, deep down, because he realizes that, even after he's made it economically, he's still a 'nigger' to many whites," says Robert Tindal of the NAACP. "He thought that if he cut his lawn, kept his garbage off the street and didn't argue too loudly with his wife, he'd be accepted; but still he finds the whites leaving the neighborhood." "Postscript on Detroit—'Whitey Hasn't Got the Message'", by J. Anthony Lukas, *New York Times Magazine,* August 27, 1967, p. 53.

21. See "Apartheid American Style," pp. 43-50, by John H. Denton, Diablo Press (1967), for the section entitled "How Does Organized Real Estate Help to Maintain Segregated Housing?"

22. Harper and Row, Inc. (1955). Another popular restrictive device, the gentlemen's agreement, was the subject of a successful novel of the same name by Laura Z. Hobson, Simon and Schuster (1947).

23. Statement on Discrimination in Housing to U. S. Commission on Civil Rights by Irving M. Engel, Honorary President of the American Jewish Committee, April 12, 1962, p. 66. (U. S. Government Printing Office, Washington: 1962.)

24. "Civil Rights U.S.A., Housing in Washington, D. C.," p. 37, U. S. Commission on Civil Rights (U. S. Government Printing Office, Washington: 1962).

A. Housing Discrimination and Jobs

The confinement of Negro workers within racial ghettos is a critical factor in the disproportionately high incidence of Negro unemployment. In an address before a conference in New York City on June 29, 1965, Franklin D. Roosevelt, Jr., then Chairman of the Equal Employment Opportunity Commission, observed:

> "There are many examples to illustrate what a serious obstacle housing segregation is to employment opportunities. This is particularly true during this period when many major industries are decentralizing, moving plants or establishing branch operation in outlying and suburban areas at the same time they are actively recruiting Negro employees. Indeed, thousands of Negroes are losing jobs because they are denied living quarters in or near the new communities in which their employers are relocating their plants." [25]

Illustrative of one of the more crucial and inevitable economic consequences of housing discrimination, namely, inaccessibility of the ghetto dweller to equal occupational opportunities, is the situation in Oakland, California (in Alameda County). Oakland has a Negro population of 120,000 out of a total of 385,000. The over-all Negro unemployment rate in Oakland during the past year was 23%, while for Negro teenagers it was 41%. Yet in the suburban areas of Alameda County, where few Negroes live, there are approximately 185,000 jobs at all levels of skill, of which only 3,700 are held by Negroes. Some jobs are always open; but public transportation from Oakland to the

25. "Affirmative Action to Achieve Integration," p. 22 (National Committee Against Discrimination in Housing, New York, N. Y.: 1966).

outlying areas of the county is limited and costly, and relatively few Negroes in the Oakland slums are economically able to afford car ownership.[26]

Lyle Schaller, a city planner in Cleveland, testified before the U. S. Commission on Civil Rights as to the employment picture in the Cleveland area in 1966:

> "Most of the employment opportunities opening up are in the suburban communities, many of them in the southern and western part of the counties are quite some distance from where the Negro population lives.
>
> "* * * It raises a problem in terms of simply knowing about the jobs being advertised, of getting there before the job is filled, and this kind of thing [*sic*], plus the problem of transportation which is a serious problem for many Negro families."[27]

The January, 1968 issue of *Fortune* is devoted exclusively to "Business and the Urban Crisis." In an appraisal of the poverty and race factors in the proliferating economic problems of St. Louis, Missouri, it is observed:

> "A continuing substitution of white-collar for blue-collar jobs does not promise any great widening of employment opportunities for North Side people. And their poverty hobbles the city. * * * Many people who have thought about the matter, in St. Louis and elsewhere, would agree in a general way with the view expressed by Father Lucius Cervantes, a Jesuit soci-

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26. Hearing before the U. S. Commission on Civil Rights, San Francisco, Calif., May 1-3, 1967, and Oakland, Calif., May 4-6, 1967, pp. 16 and 558. (U. S. Government Printing Office, Washington: 1967.)

27. Hearing before the U. S. Commission on Civil Rights, Cleveland, Ohio, April 1-7, 1966. p. 102. (U. S. Government Printing Office, Washington: 1966.)

> ologist and brother of St. Louis' present mayor.' 'The answer,' he says, 'is to disperse the ghetto. Jobs are in a ring around the city. Allow the poor to follow the jobs.' * * * If a cross-migration could come about, with some middle-class whites moving back to the cities they work in and some Negroes moving out to the suburbs to live and work, it would be possible to discern a less clouded future for St. Louis. * * * But nothing like this can be expected, on a scale large enough to matter, without some new political arrangements. The power of the city stops at that 1876 boundary, and the county beyond wants nothing less than an inflow of Negroes from the city. Some overarching authority would be required to open up the suburbs to large numbers of Negroes—perhaps some kind of metropolitan government imposed, or at least fostered, by state intervention. It is not a good bet that effective new arrangements will emerge any time soon. Yet unless things move in that direction, it is hard to see any future for St. Louis—and by inference many other U. S. cities—except deepening economic blues.'' [28]

In sum, there is ample evidence to confirm the correlation between Negro housing segregation in the core cities, and the inability of Negroes to hold jobs in suburban areas which, in effect, are closed to them as places of habitation.

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28. "The St. Louis Economic Blues," William S. Rukeyser, *Fortune*, January, 1968, p. 212.

B. Houing Discrimination and School Segregation

> "Segregated schools perpetuate feelings of inferiority in Negro children and unrealistic feelings of superiority in white children. They debase and distort human beings. They impair the ability of children to profit from democratic education. Indeed, they make it practically impossible to educate children in the ideals of democracy. Before the schools of America can play an effective role in improving the levels of our democracy—before they can prepare children for life in terms broader than mere academic subject matter—the system of segregated schools must be eliminated." [29]

In the landmark case of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), this Court ruled that legally enforced racial segregation in public schools violates the equal protection clause of the Fourteenth Amendment. This Court took judicial notice of the harm done inevitably to Negro children by maintenance of segregated schools. There was no implication in that opinion, however, that segregated schools are detrimental to Negro children only when the segregation is imposed by the state. In fact, the opinion (at 494) cited with approval a finding by a Kansas court that the "impact is *greater* when it has the sanction of the law;" (italics added), thus clearly implying that there is an impact in any event. Since most children in northern cities attend neighborhood schools, and since most residential neighborhoods are racially structured, it is scarcely

29. "Prejudice and Your Child," Dr. Kenneth B. Clark, then Associate Professor of Psychology, City College of New York, Beacon Press (1955), p. 87. The monograph upon which this book was based was titled "Effect of Prejudice and Discrimination on Personality Development" and was cited in footnote 11 in *Brown*, *supra*, at 494.

surprising that eliminating *de facto* school segregation would be surpassingly difficult, unless housing patterns are radically altered:

> "Indeed, discrimination and segregation in housing are clearly at the root of the whole syndrome of racism involved in the civil rights struggle. Effective and permanent success in the elimination of any single facet of the total civil rights problem is improbable so long as discrimination persists in housing; and this inter-relationship is perhaps most demonstrable in respect to schools. It is clear that housing desegregation is critical to successful widespread desegregation of schools in large urban centers." [30]

C. Other Consequences of Housing Discrimination

(1) Psychological and Social

When racial or ethnic factors, in effect, confine people to a particular residential enclave, the total quality of their lives is affected thereby. Not merely in schools and jobs, but also in churches, hospitals, restaurants and bars, recreational and civic activities, their associations are apt to be restricted to those of their own group. Their interests thus are directed narrowly inward, rather than toward the larger society outside. To the extent that the cultural and social lives of people flourish as a result of a spontaneous sharing of ideas, attitudes, values and styles of life, ghetto inhabitants to the contrary are stunted in their development as human beings by the very fact of their involuntary isolation.[31]

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30. Address by Robert L. Carter, General Counsel, NAACP, Housing Conference, New York, June 29, 1965, as reported in "Affrmative Action to Achieve Integration", p. 28 (National Committee Against Discrimination in Housing, New York, N. Y.: 1966).

31. "Where Shall We Live?"—Report of the Commission on Race and Housing, pp. 35-37 (University of California Press, 1958).

The psychological consequences of enforced residential segregation have been depicted in the following terms:

> "Psychologists are generally agreed that compulsory segregation has harmful psychological effects on the segregated groups. Arbitrary interference with an individual's pursuit of what he considers, and is socially encouraged to consider, a legitimate goal (such as better housing) produces feelings of frustration, hopelessness, and hostility. When minority families are prevented from moving into better homes and neighborhoods as their incomes rise, a normal incentive to self-improvement is taken away. They become habituated to a low standard of housing, and their aspirations for something better are curtailed.
>
> "As an unceasing reminder of inferior status, segregation and the discrimination that goes with it are damaging to the personality development of minority children. Many, particularly adolescents, develop feelings of inferiority and doubts of their personal worth, and they fail to develop strong motivations to achievement.
>
> "Disorganization of family life, common among Negroes of the lower class, results from a historical complex of factors of which housing conditions are only one. However, one of the consequences of segregation has been to compel many Negro families to occupy quarters poorly adapted to family needs. The crowded conditions in many Negro households and the lack of suitable space and facilities for family living have unquestionably contributed to the instability of Negro family ties."[32]

But the psychological damage wrought by segregated housing is by no means limited to Negroes, although surely they are its chief immediate victims. The nation as a whole

32. *Ibid.*, p. 38.

already has paid a terrible moral price for ghettoization in terms of widespread interracial fear and hatred, in the considerable antipathy to America among the non-white peoples who constitute a majority of the world population, and in the inescapably corrosive psychological impact on everyone when a major segment of the community suffers visibly from high rates of physical and mental disease, family breakdown, crime and delinquency.[33]

(2) Crime and Delinquency

Among the domestic concerns of the American people today, the rising crime rate throughout the country perhaps is preeminent. While the problem is exceedingly complex, and no single causative factor may be used to explain criminality, the link between poverty and lawbreaking has been quite conclusively established:

> "One of the most fully documented facts about crime is that the common serious crimes that worry people most—murder, forcible rape, robbery, aggravated assault, and burglary—happen most often in the slums of large cities. Study after study in city after city in all regions of the country have traced the variations in the rates for these crimes. The results, with monotonous regularity, show that the offenses, the victims, and the offenders are found most frequently in the poorest, and most deteriorated and socially disorganized areas of cities. * * * Burglary, robbery, and serious assaults occur in areas characterized by low income, physical deterioration, dependency, racial and ethnic concentrations, broken homes, working mothers, low levels of education and vocational skill, high un-

33. "Emotional Aspects of School Desegregation—A Report by Psychiatrists," pp. 8-9 (Group for the Advancement of Psychiatry, New York, N.Y.: 1960).

employment, high proportions of single males, overcrowded and substandard housing, high rates of tuberculosis and infant mortality, low rates of home ownership or single family dwellings, mixed land use, and high population density. Studies that have mapped the relationship of these factors and crime have found them following the same pattern from one area of the city to another."[34]

* * *

"Delinquents tend to come from backgrounds of social and economic deprivation. Their families tend to have lower than average incomes and social status. But perhaps more important than the individual family's situation is the area in which a youth lives. * * * Thus Negroes, who live in disproportionate numbers in slum neighborhoods, account for a disproportionate number of arrests. Numerous studies indicate that what matters is where in the city one is growing up, not religion or nationality or race. * * * But for Negroes, movement out of the inner city and absorption into America's middle class have been much slower and more difficult than for any other ethnic or racial group. Their attempts to move spatially, socially, economically have met much stiffer resistance. Rigid barriers of residential segregation have prevented them from moving to better neighborhoods as their desire and capacity to do so have developed, leading to great population density and to stifling overcrowding of housing, schools, recreation areas. Restricted access to jobs and limited upward mobility in those jobs that are available have slowed economic advance."[35]

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34. "The Challenge of Crime in a Free Society"—A report by the President's Commission on Law Enforcement and Administration of Justice, p. 35 (U. S. Government Printing Office, Washington: 1967).

35. *Ibid.*, p. 57.

(3) Uninsurability of Ghetto Property

Among the numerous plaguing consequences of ghettoization is the inability of the residents and property owners in ghettos to secure fire and burglary insurance. This has always been so; "* * * the search for ways to make insurance available in ghetto areas represents a new phase of an old insurance problem." *Business Week* (September 9, 1967) p. 120. Understandably, the persistence of this problem serves also as a powerful deterrent to new business investments urgently needed in such areas.

The President's Commission on Civil Disorders has recognized that this problem was exacerbated by the civil disturbances that took place in predominantly segregated Negro areas in a dozen or more cities during the summers of 1965, 1966 and 1967. This has to do with the reluctance of the insurance industry to cooperate with a voluntary plan designed to provide new fire and burglary insurance for property owners, tenants, and merchants in those slum and ghetto areas.

Hearings have been held under the auspices of the President's Commission by an Advisory Panel on Insurance in riot-affected areas, whose chairman is Gov. Richard J. Hughes of New Jersey.

The result of the failure or refusal, so far, of insurance companies to issue fire and burglary policies has caused a still further significant deterioration in Negro ghettos, especially in those areas which have been called "riot-prone." Negro homeowners and tenants, as well as merchants—Negro and white—are the principal sufferers.[36]

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36. *Wall Street Journal*—July 28, 1967; *New York Times*, November 25, 1967.

III

Causes of Negro Segregation in Housing

"Access of the Negro to decent housing is becoming the vortex around which his other rights revolve. Without housing in areas of his choice, the right of his child to an unsegregated school is meaningless; his right to a job will be impaired; his right to move and to secure shelter in a decent neighborhood will be an empty shell."[37]

There is little disagreement concerning the prevalence of residential segregation based on race; there is considerable disagreement as to its derivation. One widely held opinion is that most Negroes prefer to live separately from whites. Another view is that the crucial determinant in the choice of a place to live is an economic one. Still others believe that purposeful discrimination by whites against Negroes is the paramount factor in housing segregation, suffocating the Negro, and throttling the development of an open society.

An impressively documented article in *Scientific American* (August, 1965) by Karl E. Taeuber, Associate Professor of Sociology at the University of Wisconsin, weighed and analyzed statistically the merits of the latter two divergent points of view. Using a "segregation index," which was applied to 207 cities in the United States, the author concluded that by far the primary cause of racial division in housing was intentional discrimination by whites.

37. "The Housing Problem and the Negro," Charles Abrams, Chairman, Department of Urban Planning, School of Architecture, Columbia University, *Daedalus*, Winter, 1966, p. 72 (Journal of the American Academy of Arts and Sciences).

With regard to the frequently articulated allegation that most Negroes "voluntarily" cluster together as a matter of personal predilection, Dr. Taeuber stated that the available evidence appears to negate this interpretation. In our society, he asserts, prejudice and discrimination are so manifestly deep and pervasive that "freedom of choice" by Negroes is an illusion. One illustration of this is the almost invariably hostile reception accorded any Negro family which dares move into an all-white neighborhood, nearly anywhere in the country (i.e., one of the most flagrant examples: Cicero, Illinois).[38]

As for economic status motivating segregation, Dr. Taeuber's analysis indicated that it is far less significant than many have supposed:

> "There is an even simpler demonstration of the inadequacy of the poverty explanation for residential segregation. The crucial assumption that white and Negro families at the same income level are not residentially segregated is patently false. In no city do high-income Negroes live randomly scattered in the same neighborhoods as high-income whites. In no city do low-income Negroes live in the same neighborhoods as the majority of low-income whites. Regardless of income, most Negroes live in Negro neighborhoods and most whites live in white neighborhoods. * * * Neither free choice nor poverty is a sufficient explanation for the universally high degree of segregation in American cities. Discrimination is the principal cause of Negro residential segregation, and there is no basis for anticipating major changes in the segregated character of American cities until patterns of housing discrimination can be altered." (p. 9)

38. *New York Times,* July 13, 1951.

IV

An Enforceable Federal Open Occupancy Law Already Exists

In considering Section 1982 as presently satisfying the requirements of a federal statute proscribing discrimination in private housing, we have paid heed to the contention, hitherto made frequently, that Congress has no constitutional authority to enact such legislation. We contend that any doubt on that score is no longer tenable, since it is by now clear, under decisions of this Court during the last 30 years, that under the Commerce Clause of the Constitution, Congress possesses such plenary power (*Wickard* v. *Filburn,* 317 U. S. 111 (1942); *Katzenbach* v. *McClung,* 379 U. S. 294 (1964). In *Heart of Atlanta Motel, Inc.* v. *U. S.,* 379 U. S. 241 (1964), at 257, this Court was concerned with whether Congress was limited to the promotion of commerce or even to the mere avoidance of interference with commerce. This Court found that such limitation was not necessary: "That Congress was legislating against moral wrongs in many of these areas rendered its enactment no less valid."

It must just as forcibly be true that Congress may enact fair housing legislation in pursuance of its power under Section 5 of the Fourteenth Amendment, which provides that: "Congress shall have power to enforce by appropriate legislation the provisions of this article." This Section, interpreted more broadly than was done in the *Civil Rights Cases,* 109 U. S. 3, should be interpreted as conferring upon the Congress all power necessary to achieve the basic purpose of the Fourteenth Amendment, namely, to end inequality based on race.

Except for thus indicating the relevancy of this view of Section 5 to the comments that follow, we will not extend our argument in support of its applicability to the facts in this case, because the briefs of the petitioners and the other *amici* will, we understand, argue this point at greater length.

Twenty-two states thus far have enacted open occupancy statutes, with varying degrees of comprehensiveness. Yet, since laws are not self-executing, it is apparent that they have not resolved the problem of housing discrimination in those states. They have helped to some extent, but aggressive enforcement of these laws has been impeded by stubborn resistance to integration (i.e., the Proposition 14 case in California[39]). Such legislation simply does not, as yet, command the allegiance of a clear majority of white citizens who, unhappily, do not fully appreciate the enormity of the housing segregation problem. Wherever fair housing laws are submitted for approval to the electorate by means of referenda, the common experience has been that they are rejected.[40] The harsh truth is that many elements in this nation, almost from its very founding, have nurtured a society with walls of separation in countless places between the dominant whites and the subservient non-whites (Indians, Negroes, etc.). The American dream has been sharply at variance with the American reality. The situation in housing today clearly reflects this tragic history of Negro deprivation, even as it serves to perpetuate and to compound it.

39. *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

40. "Fair Housing Statutes and Ordinances" (a compilation published by National Committee Against Discrimination in Housing, New York, N. Y.: June, 1966).

The Constitution of the United States, however, is not necessarily, nor perhaps even essentially, a majoritarian instrument. In the eyes of many, its peculiar genius lies in the sturdy protection afforded by it to minority rights which may be traduced by majority encroachment. This Court has in the past been sensitive to numerous threatened denials of basic human rights such as religious liberty.[41] We submit that the right to live where one chooses, within the limits of economic capability, regardless of the inhospitality of others (who enjoy the collateral right to move should they so choose), is a right equally worthy of protection by this Court.

This much is clear: a federal open occupancy law, such as is already provided by Section 1982, will be no panacea. The implementation of such a law, however, for its moral and educational value alone, would constitute a giant step forward along the road to the professed American goal of "liberty and justice for all." Moreover, the mere fact that certain of the state statutes have received rather sluggish enforcement does not mean that the federal government need follow suit. Vigorous leadership and affirmative action to insure compliance with a national open occupancy law could well trigger a positive response throughout the country in favor of open housing for all. Some people who are opposed to a fair housing ordinance solely in their own community, fearing an island of open occupancy in a sea of exclusion, may feel quite differently were open occupancy to become the general rule rather than the exception:

41. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

> "It is important to remember too, that if there were a free housing market for Negroes in the United States today there would be no reason to fear wholesale invasion. Negroes represent less than five per cent of the total population in the North today. If they were not restricted in the choice of their homes to a few ghetto areas, they could easily disperse throughout the country and there would be little reason to fear that they might inundate any single community."[42]

In very large measure, attitude changes derive simply from what people have become exposed or accustomed to; our fair employment practices laws demonstrate that truism. It is time, then, to accustom the American people to integrated housing, and the statute to accomplish this objective is already part of the federal law (§1982). Only its activation yet remains to be achieved.

Conclusion

The decision of the Court below should be reversed.

Respectfully submitted,

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Of Counsel

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42. *The Myths of Racial Integration,* Naomi Levine (American Jewish Congress, New York, N. Y.: 1960).

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IN THE

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., and ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents.

BRIEF *AMICI CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, AND BY THE METROPOLITAN CHURCH FEDERATION OF GREATER ST. LOUIS

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(2) Because state actions, governmental functionings and expenditures are involved in the creation and viability of this huge racially segregated quasi-municipality operated by the defendants with profiting by racism 5

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BRIEF *AMICI CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, AND BY THE METROPOLITAN CHURCH FEDERATION OF GREATER ST. LOUIS

All parties to the case have given written consent to the filing of this brief.

The interest of the *amici* is the direct consequence of the nature of their own commitments and of the issue here involved.

The National Council is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the co-operative agency of thirty-four Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 throughout the United States. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

The Metropolitan Church Federation is a Missouri corporation of a similar nature and purpose. It is officially committed "to pray and work for the elimination of segregation and discrimination in every respect of our common life."

In November, 1953, the National Council's General Board (the governing body) adopted "A Statement on the Churches' Concern for Housing." It included the following:

> "We appeal to all church members to support every sound and reasonable effort to put an end to the exclusion of any person on account of race, color, creed, or national origin or ancestry from equal opportunity to rent or purchase living accommodations with all available facilities and services at equitable cost in any neighborhood."

This Statement has continued to express the National Council's "Concern for Housing"—a concern shared by the Metropolitan Church Federation. Obviously it relates itself to the heart of:

The Question Here Involved

> Is the concerted "general policy" of the defendants, adopted for financial profit to themselves, in excluding Negroes from purchasing homes in their community developments of 2700 families, actionable by the excluded plaintiffs under the Constitution and laws of the United States?

Since the complaint was dismissed for failure to state a cause of action, the facts pleaded present this question as one of law.

The determinations below are reported in 255 F. Supp. 115, affirmed 379 F. 2d 33.

Statutes

The pertinent constitutional provisions and Federal statutes will, we are informed, be quoted in the appellants' brief.

In Appendix A hereto we quote certain provisions of the Missouri Constitution and statu deemed to be pertinent.

The Facts

The cause of action is pleaded with full factuality.

The essence is that the three corporate defendants and the defendant Mayer (sued individually and as an officer) have concerted a "general policy" of refusing to sell to Negroes houses and lots in the communities for the housing

of 2700 families which the defendants are establishing and operating in the County of St. Louis. The plaintiffs are husband and wife employed by the Veteran's Administration. When they sought to purchase a lot and home offered in the defendants' brochure and newspaper advertisement, they were refused solely because the husband was a Negro and because the "general policy" of the defendants is not to sell to Negroes.

The corporate defendants are Missouri corporations. Alfred H. Mayer Company is the developing and construction company. Alfred Realty Corporation is the real estate dealer licensed by the Missouri Real Estate Commission. Paddock Country Club, Inc., is the operator of the golf course, tennis courts and bath facilities for the residents of the community, named "Paddock Woods." The defendant Mayer serves as managing officer and the guiding policy maker of these corporations. The financing for the corporations and the purchasers of the homes is provided by Mercantile Mortgage Company, a Missouri corporation.

Paragraphs 7 and 8 of the complaint list the various ways in which the State of Missouri and its agencies have involvements and participations necessary to the creation, maintenance, operation, government and success of the defendants' developments.

ARGUMENT

POINT ONE

The decisions below zero in upon today's central issue of constitutional and statutory equality in citizenship.

The complaint states a cause of action:

(1) Because the defendants' concerted and declared "general policy" for their vast quasi-municipality denies to the plaintiffs their personal rights as citizens under the Constitution and laws of the United States; and also

(2) Because state actions, governmental functionings and expenditures are involved in the creation and viability of this huge racially segregated quasi-municipality operated by the defendants with profiting by racism.

We submit that the decisions below provide an open door for exclaves in our American society of vast quasi-municipalities built on the exploitation of racism and discrimination for profit.

What has been done here at the expense of the civil rights of Negroes can equally be done at the expense of citizens of other national origins or of religious groups whose exclusion can be deemed profitable.

As this Court noted in *Katzenbach* v. *McClung,* 379 U. S. 294, 301:

> "racial discrimination was not merely a state or regional problem but was one of nationwide scope."

I

Unquestionably "housing is a necessary of life." (*Block* v. *Hirsch,* 256 U. S. 135, 156.)

As such, housing and its concomitant "homes" are among those primary human and civil rights to "life, liberty and the pursuit of happiness" which the constitutional and statutory structure of American government commands must be equal among all citizens regardless of race, creed and color. (*Shelley* v. *Kraemer,* 334 U. S. 1, 10.)

The issue here is not one of private concern. It is not personal or social. The plaintiff is a representative Negro citizen living under a Constitution which is color blind. The defendants, using the laws and services of the State of Missouri, are developing and controlling lots and homes for a vast community of 2700 families, the equivalent of a municipality of over 10,000 persons. For no personal or social reason of their own, but in order to profit from racism, they have openly decreed that their community shall be exploited for whites only. Negro citizens, no matter how cultured and financially qualified, will be fenced out.

What was said by Mr. Justice Douglas in *Bell* v. *Maryland,* 378 U. S. 226, as to the corporate owner of a restaurant racially conducted applies *a fortiori* to Mr. Mayer's corporate owners of this community (p. 245):

> "The corporation that owns this restaurant did not refuse service to these Negroes because 'it' did not like Negroes. The reason 'it' refused service was because 'it' thought 'it' could make more money by running a segregated restaurant."

In *Clover Hill Swimming Club* v. *Goldsboro,* 47 N.J. 25 (219 Atl. 2d 161), the defendant "Club" was a privately owned corporation operated for the profit of its stockholders. It advertised itself as a development on a 170 acre site of "a private family club with complete recreational facilities, lake swimming, tennis, skating and golfing," and limited to 400 family members. Dr. Goldsboro and wife (Negroes) duly applied for membership. The Supreme Court of New Jersey affirmed an order directing their admission because by the development's nature it was "a place of public accommodation" under the New Jersey Civil Rights Law. In refuting the claim that the defendant Club was within the exemption of private or social organizations, the Court made the following statement highly pertinent here (p. 166):

> "In other words, Clover Hill originated not because certain residents of Passaic Township wished to associate themselves in a swimming club, but rather because an entrepreneur was seeking a profitable investment."

Here the defendants' development and resultant quasi-municipality are in no sense a merely private investment of private concern only. Paddock Woods as a community is offered to the public for profit from the public. The defendants themselves and the public services which they offer and require have clothed it with public interest. Public interest and public government (state and federal) of necessity have an essential and inescapable relation, right and duty as regards Paddock Woods as a community in many ways detailed factually in paragraphs 7 and 8 of the complaint.

As this Court said in *Evans* v. *Newton,* 382 U. S. 296, 299:

> "A town may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector."

In *Marsh* v. *Alabama,* 326 U. S. 501, the Gulf Shipping Corporation had established a similar community of residences, streets, sewers, etc., known as Chickasaw. The town's management forbade the distribution of religious literature. Notwithstanding that the property was privately owned by the Corporation, this Court held (p. 505) "the corporation's property interests" did not "settle the question", and that the prohibition violated the freedom of religion and press guaranteed by the First and Fourteenth Amendments. This Court said (the language being recently repeated in *Lombard* v. *Louisiana,* 373 U. S. 267, 275) (p. 506):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

Concurring, Mr. Justice Frankfurter said (p. 511):

> "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations."

If these principles are true for the freedoms of religion and the press as civil rights, they are equally true for the equal protection of the laws and equality in citizenship as civil rights.

Pertinent also is the following from *Munn* v. *Illinois*, 94 U. S. 113, 126:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large."

Where an entrepreneur seeks to profit by creating, advertising and operating a privately owned segregated municipality of 2700 families with its management controlled by himself, he cannot demand of the law that it be deemed an exclave exempt from the law of the land applicable to any other organized municipality. He has taken upon himself powers akin to those of the State and municipal in nature; and he cannot be permitted to exercise them for racial discrimination. (*Marsh* v. *Alabama*, 326 U. S. 501, 505, 509.)

The consequences of the decisions below can be devastating to the unity, peace and even survival of our nation.

If Mr. Mayer has indeed successfully found a lawful loophole for profiting in the sale of racism as regards Negro citizens, he and other seekers after profit can do likewise as regards citizens of other national origins (Puerto Rican, Jewish, Italian, etc.), or as regards religious groups of citizens (such as Jehovah's Witnesses, Muslims, etc.), deemed by them likely to depress values.

Through such a loophole all the evils and dangers of racial and religious discrimination against which our Constitution and Civil Rights Laws are designed to immunize our nation and its people, can be brought flooding back until they become a roaring torrent. The vast suburbia

around our cities can be converted into sanctuaries for racial or religious monopolies and bigotries and into means of fencing into our cities those who are thus reduced to second or third class citizenship and to restricted privileges in the opportunities and dignities of American life.

Apartheid would be effectively introduced and given immunity. Racism would be advertisable and salable.

"There is no legally protected interest in segregation." (*Wanner* v. *County School Board,* 357 F.2d 452, 454.)

II

In our view a finding of state action, although abundantly and necessarily present here, is not necessary to this cause of action.

The action of the defendants themselves in creating and operating this vast quasi-municipality, the equivalent, with their adjoining like development, of a small city of 2700 families (over 10,000 people), has made it and them subject to the same laws of the land as are applicable to any organized municipality. (*Marsh* v. *Alabama,* 326 U. S. 501, 505, 507, 511; *Evans* v. *Newton,* 382 U. S. 296, 299.)

Section 19 of the Constitution of the State of Missouri provides:

> "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state, in the following manner:"

The defendants cannot for their own profit excise a large segment of Missouri from the Constitution and laws of the United States by soliciting the public to colonize it on the basis of racial discrimination.

The complaint expressly alleges (par. 8):

> "Defendants Alfred H. Mayer Company, Alfred Realty Company and Alfred H. Mayer have prepared or shall prepare a deed embodying certain restrictions on the use of the property sold to individual buyers in said subdivision and on that land which is common to all residents and have the same recorded along with the deeds delivered to those buying homes, and an association of the residents will be formed which will have the power to enforce these restrictions against owners of homes within the subdivision, through judicial recourse if necessary, which power is the equivalent of the power to design and enforce zoning ordinances and the power to function as municipal government generally. Community facilities and services will be provided and performed under the direction of a Board of Trustees appointed by Defendant Alfred H. Mayer, which will be granted the power to levy assessments, and to collect these assessments through judicial action in case of default, including the establishment of liens on properties located in said subdivision and to make contracts for the performances of the services for the benefit of Paddock Woods residents, which powers are equivalent to the function of a municipal government."

Can it be doubted that if this Board of Trustees adopted a resolution, or perhaps more accurately an ordinance, to the effect that lots and houses must not be sold to Negroes or to persons of other specified national origin, or to persons of particular religious beliefs, such action would be

just as violative of constitutional and statutory civil rights as would like action by a Village Board of Trustees or Town Council? The fact that in this case the action is the "general policy" of the defendants for this quasi-municipality confers no exemption. As said in *Terry* v. *Adams,* 345 U. S. 461, 480: "An old pattern in new guise is revealed by the record."

In his concurring opinion in *Lombard* v. *Louisiana,* 373 U. S. 267, Mr. Justice Douglas, discussing whether a private restaurant was immune from constitutional restrictions on racial discriminations, quoted (p. 275) as follows from *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 408:

> "It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest."

III

The basic error in the decision below, as we see it, is in its underlying assumption that to be actionable there must be "state action" which is something overt, direct or primary by the state itself.

The decisive sentence in the opinion of the Court of Appeals seems to be that the plaintiffs' case "relies on state inaction, rather than state action," and "relies upon state assistance which is non-discriminatory in itself" (379 F. 2d 33, 44). In other words, "state assistance" is conceded by the Court, but is regarded as neutral in what is assisted.

Our position, on the other hand, is that where the state assists with its services, requirements and laws an organization and community of people such as is alleged here, it necessarily assists all that is an integral part of it. A *fortiori* is this true where what is so assisted could not come into existence or be operable except with such assistance and in accord with state responsibilities and authorizations for it.

Jim Crowism is alien to American municipalities whether operated directly by the State or operated privately with the assistance of the State.

According to the facts pleaded, "it is defendants' 'general policy' not to sell said houses and lots to Negroes" (par. 6). Such a "general policy" is not merely coincidental. It is openly declared, and is central and determinative of the whole character and commercial identification of the development. In servicing, supervising and protecting the development governmentally, the State and its agencies are themselves accessory both in fact and in law to this built-in racial discrimination for this vast community into which the defendants are for their own profit soliciting the public with an assurance of Negro exclusion.

The rights here involved are in no sense merely personal or "social." There is no resemblance to the unquestioned right of an individual to choose his friends, associates or neighbors. There is no resemblance to a merely social club, with members having common acquaintance or common interest. An individual's constitutional right of association is in no way involved.

The "general policy" here involved is that of the entrepreneur Mayer as a community creator, salesman and private legislator. It is deemed by him to be essential to the success and profits of his investment. Through his corporations he enacts and imposes it as the local law for his planned communities, irrespective of public law and policy. Mr. Mayer could equally determine to allow no citizens of Puerto Rican, Italian or Jewish origin, etc. He and his Missouri corporations and not the United States Constitution will determine the criteria and privileges of eligibility and citizenship in his subdivisions of the State of Missouri.

Yet, obviously, Mr. Mayer could not create or operate his communities without (as the complaint alleges) state licenses and licensees, state fire, police, sewage and highway department services and regulations, state courts to enforce his contractual structurings, state zoning and building codes and agencies, state education for the children of his 2700 families, electric, telephone and water services by state licensed and supervised public utilities, state rights and immunities conferred by Missouri's corporation laws, financing by a state incorporated and regulated mortgage corporation, etc. See paragraphs 7 and 8 of the complaint.

The complaint specifically alleges (par. 7):

> "(1) The Building Commissioner of St. Louis County must approve the plans of Defendants and cooperate with Defendants in order to accomplish the building of homes in said subdivision.
>
> "(2) The Metropolitan St. Louis Sewer District has furnished and will furnish sewer services to the said subdivision.

"(3) The Planning Commission of St. Louis County and the St. Louis County Council are responsible for the zoning of the land in said subdivision and the enactment of an overall plan for use of land which will assure that this subdivision will retain its value as a successful residential area."

The Appendix to this brief sets forth certain pertinent Missouri statutes showing the direct participation of the State of Missouri and its agencies in the viability of this Mayer town.

IV

In terms of constitutional and statutory civil rights, "state action" need not be exclusive, direct or explicit, or be itself inspired by discrimination.

As said in *United States* v. *Guest,* 383 U. S. 745, 755:

"This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation. See, e.g., *Shelley* v. *Kraemer,* 334 U. S. 1; *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715; *Peterson* v. *City of Greenville,* 373 U. S. 244; *Lombard* v. *Louisiana,* 373 U. S. 267; *Griffin* v. *Maryland,* 378 U. S. 130; *Robinson* v. *Florida,* 378 U. S. 153; *Evans* v. *Newton, supra,* 382 U. S. 296."

In *Evans* v. *Newton,* 382 U. S. 296, this Court said (pp. 299, 301):

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. * * *
>
> "This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race."

In *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, a publicly-owned and operated automobile parking building leased a portion of the premises to a private operator of a restaurant which refused service to the plaintiff because he was a Negro. The Supreme Court of Delaware held that the lessee was acting in "a purely private capacity" and hence that his refusal was not state action within the Fourteenth Amendment. In discussing this case in *Reitman* v. *Mulkey,* 387 U. S. 369, this Court conceded that "the State neither commanded nor expressly authorized or encouraged the discriminations" (p. 380). Nevertheless, in the *Burton* case this Court reversed, because (p. 724):

> "the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to

> serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings."

In *Smith* v. *Holiday Inns of America, Inc.*, 336 F. 2d 630 (1964), the Court of Appeals for the Sixth Circuit followed this *Burton* decision, notwithstanding that the defendant private corporation held in fee and not by lease and the motel was located in a privately owned urban development project. The Court enjoined the defendant from denying to Negroes "the right to purchase and enjoy all accommodations offered at the Holiday Inn-Capitol Hill" (p. 631). The Court said (pp. 634, 635):

> "The single pervasive fact which defendants seek to ignore but which this court cannot is that this motel is part and parcel of a large, significant, and continuing public enterprise—the Capitol Hill Redevelopment Project. This motel was conceived by the planners of this project, its creation was made possible by the execution of the project, and its existence is now governed to a great degree by the project's predetermined design and controls. * * * But in both Burton and the instant case, the basic plan, the financing, the land acquisition, the execution of the plan, the continuing supervision of the plan are all state actions under state law and through state agencies. Under these circumstances we do not believe that the distinction between sale and lease is a crucial one."

In *Wimbish* v. *Pinellas County, Florida,* 342 F 2d 804 (1965) Fifth Circuit, three Negroes successfully brought an injunction suit against a privately operated golf course from which they were excluded because of race. The golf

course was leased from Pinellas County for use only as a golf course; but the County had to approve the tenant's plans for improvements; prices charged for golf fees were subject to approval by the County; and the tenant's books were subject to inspection by the County for calculating the rental. The Court conceded "that the County had no purpose of discrimination in the execution of the lease." Nevertheless (p. 806):

> "It does not follow, however, that the County is any less involved in the operation of the golf course because its reasons for the lease provisions are good faith ones. Although the execution of the lease was not for the purpose of promoting discrimination, 'it is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction.' *Burton* v. *Wilmington Parking Authority*, 1961, 365 U. S. 715, 725, 81 S. Ct. 856, 861 (Footnote omitted.)"

In *Ethridge* v. *Rhodes*, 268 F. Supp. 83 (May, 1967), the District Court in Ohio sustained a complaint by Negro plaintiffs asking an injunction to prevent the State of Ohio from entering into construction contracts because the contractors were using only union hiring sources and some union officials prevented Negroes from obtaining union membership. The court conceded that the State had no intent to discriminate (p. 87):

> "However, when a state has become a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner—that is, the proposed contractors acting under contract with unions that bar Negroes—this constitutes a type of

'state action' proscribed by the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority, supra.* Thus, as in the instant suit, where a state through its elected and appointed officials, undertakes to perform essential governmental functions—herein, the construction of facilities for public education—with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring or failing to perform them. Ibid."

In *Reitman* v. *Mulkey,* 387 U. S. 369 (May, 1967), this Court upheld the Supreme Court of California in holding violative of the Equal Protection Clause the amendment to the State's Constitution, adopted by referendum, which decreed that the State should not deny to anyone the right to sell or not to sell real property to such persons "as he, in his absolute discretion, chooses." This Court (p. 376) enumerated as one of its reasons that the amendment "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment." This decision is the more pertinent because the four dissenters held (p. 389) that California had merely "decided to remain neutral."

Respectfully submitted,

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APPENDIX A

Missouri Constitution and Statutes

The development and operation of such a vast residential community as Paddock Woods and the defendants' adjoining similar developments require the involvements of the State and its agencies. These involvements range from approval by regulatory agencies and their cooperation in the location, development and maintenance.

Missouri Constitution

Section 18(a) of the Missouri Constitution provides:

"§18(a). County government by special charter—limitation

Section 18(a). Any county having more than 85,000 inhabitants, according to the census of the United States, may frame and adopt and amend a charter for its own government as provided in this article, and upon such adoption shall be a body corporate and politic."

Section 18(c) of the Missouri Constitution provides:

"§18(c). Provisions authorized in county charters—participation by county in government of other local units

"Section 18(c). The charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms up-

on which the county shall perform any of the services and functions of any municipality, or political subdivision in the county, except school districts, when accepted by vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by like vote."

St. Louis County Charter

Pursuant to these provisions St. Louis County has adopted a Home Rule Charter which provides for the legislative and administrative functions specified. (See Chapter 1003 of the St. Louis County Revised Ordinances.)

Also by §22(20) this Charter authorizes the County:

"(20) To exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning in the part of the County outside incorporated cities, and on such other subjects as may hereafter be authorized by the Constitution or by law, provided that, until superseded by ordinances of the Council, the laws pertaining to said matters shall continue to be valid and effective;"

Missouri Statutes

Subdivision and Master Plan

The St. Louis County Planning Commission is empowered to prepare, adopt, amend, extend and carry out a master plan. §64.040 Mo. Stats. Ann. The purpose of the master plan is to bring about "coordinated physical development in accordance with present and future needs." §64.040. In developing the master plan the Planning Commission is charged "to conserve the natural resources of the county, to insure efficient expenditure of public funds,

and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants.'' (Emphasis added.) *Ibid.*

Included within the scope of the master plan are, among other things, ''studies and recommendations relative to the location, character and extent of highways, railroads, bus, streetcar and other transportation routes, bridges, public buildings, schools, parks, parkways, forests, wildlife refuges, dams, and projects affecting conservation of natural resources'' (*ibid.*).

From and after the adoption of the master plan and its proper certification and recording, no improvement of a type embraced within the recommendations of the master plan may be constructed or authorized without first submitting the proposed plans thereof to the County Planning Commission and receiving the written approval and recommendations of said Commission. §64.050.

With respect to the subdivision of land, the Planning Commission is empowered to prepare and adopt regulations providing for the ''proper location of and width of streets, building lines, open spaces, minimum width and area of lots, street grading and paving, sewer, water and other utilities, which are necessary to avoid the congestion of population and to protect the public health, safety and general welfare.'' §64.060.

The County is authorized to accept a bond to secure the actual construction by the subdivider of such utilities and improvements within the period prescribed by said regulations. The statutory language infers that such regulations shall be prepared with a view to advancing physical

development according to the master plan. Section 64.070 provides that no plat of a subdivision of land within the unincorporated area of the county shall be recorded until such plat shall first have been submitted to the Planning Commission.

Zoning

Section 64.100 provides that unincorporated territory may be divided into districts to carry out the purposes of §§64.010 to 64.160, and that within such districts, regulations governing buildings, structures and land may be made in accordance with a comprehensive plan giving reasonable consideration, among other things; "to the character of the district, its suitability for particular uses, conserving the value of buildings and of existing development, and encouraging the most appropriate use of land throughout the county."

The power to adopt zoning regulations is given to the county court "for the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, to conserve and protect property and building values, to secure the most economical use of the land and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan." §64.090.

The zoning power is extended to the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry and recreation.

SUPREME COURT U. S.

JAN 19 1968

JOHN F. DAVIS, CLERK

IN THE

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OCTOBER TERM, 1967

No. 645.

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,
vs.
ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents.

ON WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.
Brief of Amicus Missouri Commission on Human Rights.

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II. Petitioner's First Amended Complaint states a claim upon which relief may be granted because respondents' refusal to consider petitioner's offer to purchase respondents' house solely on the grounds of race deprived petitioners of rights guaranteed under 42 USC Section 1982 and the Fourteenth Amendment; there is significant state involvement in the respondents' activities, the respondents' activities have a substantial impact on public interest, and the respondents act as a government instrumentality performing government functions 24

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STATEMENT.

The Missouri Commission on Human Rights, amicus curiae, adopts the statement of jurisdiction and statement of the case presented by petitioners.

The Missouri Commission on Human Rights was established in 1959 as the official arm of the State to encourage fair treatment for all groups. Chapter 213, RSMo 1959. The Commission is charged with the responsibility of enforcing the Fair Employment Practices Act, Chapter 296, RSMo Supp. 1965, and the Public Accommodations Act, Chapter 314, RSMo Supp. 1965. Missouri does not have statewide legislation prohibiting discriminatory practices in housing. A Fair Housing bill was introduced in the last regular session of the legislature but was not passed into law by the

General Assembly. (House Bill No. 501, 74th General Assembly of the State of Missouri)

This brief is submitted by the Commission on Human Rights of the State of Missouri sponsored by the Attorney General of the State of Missouri under Subsection 4 of Rule 42, Rules of the Supreme Court of the United States.

We shall in this brief endeavor to avoid repetition of arguments presented by others. However, this should not be interpreted as lack of support by the Commission for other arguments submitted in behalf of the petitioners. The Commission supports the position of the petitioners in this cause.

SUMMARY OF ARGUMENT.

I.

Discrimination affecting public rights and privileges as schools, elections, etc. clearly violates the Fourteenth Amendment. The direct consequence and proximate affect of respondents' discriminatory refusal to sell deprives the petitioners of these rights.

Many civil rights run with the land. They can be exercised in actuality only where one lives. Frequently, rights are attached to the land perforce of state or local laws. For example, in order to attend free the local public school one must be a resident of the school district.

Respondents and other suburban developers—for personal or profit motives—desire to exclude Negroes from the communities which they develop. Their concern is not primarily with Negroes owning houses but with Negro presence and involvement in the community in its many facets: schools, parks, recreation, libraries, health services, etc. Respondents are able to achieve their ends with the assistance of legal residence requirements. For example if no residence requirement applied to free public education, land developers would

be unable to exclude minority groups from the schools within the community which they are developing.

Because respondents' discriminatory purposes can only be achieved with the assistance and by the joinder of state action their conduct comes within the scope of the Fourteenth Amendment and they cannot act so as to deprive persons of fundamental human rights solely on the grounds of their race.

II.

The state, through St. Louis County, is significantly involved in respondents' development of suburban communities by its detailed and comprehensive zoning ordinances and subdivision regulations.

The respondents plan, construct, and provide for the perpetuation of a community of 2700 families. The respondents, and the board of trustees they create, plan, construct, and maintain shopping areas, streets, street lights, sewer and water systems, parks and recreational facilities; these functions are essentially governmental.

Therefore, respondents' discriminatory refusal to sell to petitioners falls within the prohibitions of the Fourteenth Amendment.

ARGUMENT.

I.

Petitioner's first amended complaint states a claim upon which relief may be granted because respondents' refusal to consider petitioner's offer to purchase respondents' house solely on the grounds of race deprived petitioners of rights guaranteed under 42 USC Section 1982 and the Fourteenth Amendment in that respondents' discriminatory refusal assisted by and joined with the state's residence requirements unlawfully deprived petitioners of public rights and privileges which are inherent in the establishment of residence.

Discrimination affecting public rights and privileges as schools, elections, etc. clearly violates the Fourteenth Amendment. The direct consequence and proximate affect of respondents' discriminatory refusal to sell deprives the petitioners of these rights.

Many civil rights run with the land. They can be exercised in actuality only where one lives. Frequently, rights are attached to the land perforce of state or local laws. For example, in order to attend free the local public school one must be a resident of the school district.

Respondents and other suburban developers—for personal or profit motives—desire to exclude Negroes from the communities which they develop. Their concern is not primarily with Negroes owning houses but with Negro presence and involvement in the community in its many facets: schools, parks, recreation, libraries, health services, etc. Respondents are able to achieve their ends with the assistance of legal residence requirements. For example if no residenee requirement applied to free public education, land developers would be unable to exclude minority groups from the schools within the community which they are developing.

Because respondents' discriminatory purposes can only

be achieved with the assistance and by the joinder of state action their conduct comes within the scope of the Fourteenth Amendment and they cannot act so as to deprive persons of fundamental human rights solely on the grounds of their race.

In its testing for the "actuality of state involvement" the district court erroneously separated the purchase of a house from the milieu of rights and privileges which necessarily inhere in the establishment of residence. These community rights and privileges are inseverable from residence. They run with the land.

Petitioners alleged that respondents' subdivision development here would result in a suburban community of approximately 2700 families providing all the needs of a residential community such as streets, recreational facilities including a golf course, bath and tennis club, sanitation collection, etc., and that community facilities and services will be provided under the direction of the board of trustees which will have the power to levy assessments, to establish lends on property and to make contracts for the performance of services for the benefit of Paddock Woods residents equivalent to functions performed by a municipal government. Allegation No. 8, Plaintiffs First Amended Complaint; 255 F.Supp. 115, 128.

The court recognized that these public services would have to be provided on a nondiscriminatory basis. "It may well be that once streets are built, parks set aside and garbage collection provided for by defendants, the residents of this subdivision will be entitled to utilize these services on a nondiscriminatory basis. But this is not the question before us." 255 F.Supp. 115, 129.

The court also recognized that the availability of educa-

tional and various state and county facilities must be available to all citizens without discrimination. Supra, l.c. 128.

The district court noted that there was no contention that petitioners were barred from using the streets which respondents would build and maintain within the subdivision. The court however failed to note that respondents' action would effectively bar the petitioners from using the educational, recreational, health and other public services which run with the land.

The district court found "The state has not intervened to assist defendants." Supra, l.c. 129. But the district court failed to discover that the state's action in conditioning public rights and privileges upon residence established a tool which the respondents made use of to discriminatorily deprive petitioners of free choice of the community in which they would live.

The district court stated, supra, l.c. 129:

> "When all is said and done, the complaint clearly demonstrates that defendants did no more than politely refuse to enter into a contract of sale with plaintiffs."

The district court limited its attention to the transfer of a piece of realty as though it were a mobile commodity severable from the community within which it is located. The district court narrowly focused on a singular event without looking beyond to its normal and necessary consequences. The transfer of realty is merely the gate through which one goes to enter the community. The consequences of the transfer are the entering into the community and the receipt of all the rights, privileges and responsibilities which attach to the community. **The real rights at issue here are those which follow as the consequence of the transfer of real estate.** The substance of this case lies on the other side of the gate. With the assistance of state action, respondents have

discriminatorily deprived the petitioners of those substantive rights.

All have the unquestionable constitutional right to public education without discrimination as to race, creed or national origin. Yet this right remains inchoate so long as it is unaccompanied by freedom of residence. It runs with the land.

Most public school systems in this nation in urban areas divide the district into attendance zones based upon a neighborhood plan. This is the traditional method of allocating schools particularly at the elementary level. As a result, housing patterns have frequently frustrated the efforts at national and local levels to eliminate segregation in education.

Where neighborhood attendance zones are fairly drawn the courts have upheld the neighborhood system and considered segregation resulting from housing patterns to be a matter outside the control of boards of education.

In **Mapp v. Board of Education of the City of Chattanooga,** 6 Cir., 373 F.2d 75, the plaintiffs objected to the use of attendance zones by the school board. The court stated, l.c. 78:

> "If this policy has resulted in a larger attendance of white or Negro children in a particular school it is because of their residences, a factor which the Board of Education cannot control. No child, Negro or white, has been denied the right to attend school in the zone of his residence." (Emphasis ours)

In **Deal v. Cincinnati Board of Education,** 6 Cir., 369 F.2d 55, the court also considered a neighborhood attendance zone plan, l.c. 60:

> "In the present case, the only limit on individual choice in education imposed by state action is the use of the

neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and **they can move into the neighborhood district of such a school.** This situation is far removed from **Brown,** where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school prejudice. We read **Brown** as prohibiting only enforced segregation." (Emphasis ours)

The court's advice, "they can move into the neighborhood district of such a school," is meaningful to a white citizen but not to the Negro so long as respondents and other community developers discriminate in the sale of housing.

In the City of St. Louis school district residential segregation has perpetuated de facto segregated schools despite the fact the administration has voluntarily complied with the **Brown** decision. U. S. Commission on Civil Rights, **Racial Isolation in the Public Schools** (1967), pages 33 and 60.

By law this State provides public education through local school districts which are separate public corporations with definite geographic boundaries. Chapter 162, RSMo Supp. 1965. The law further authorizes the subdividing of school districts into attendance zones. Section 177.091, RSMo Supp. 1965.

In order to receive a free public education within a school

district the law requires that the pupil be a resident of the district. Nonresidents are admitted only on a tuition basis. Within a school district the school board may by reasonable regulation require a people to attend the school within the attended zone within the district. Thus, by virtue of the state and local governmental requirements residence becomes the key to exercising the right to freedom of choice in education.

The problem is further complicated by the fact that discriminatory housing patterns also affect the primary political method of effecting social reform, namely, elections. Missouri statutes provide for the reorganization or annexation of school districts. Chapter 162, RSMo Supp. 1965. But the key to these procedures is the vote. Before a reorganization can occur the proposition must be approved by a majority of the voters in the district to be annexed and also approval of the board of directors of the district making the annexation. Section 162.441, RSMo Supp. 1965. Therefore, so long as some school districts (e.g. Kinloch, discussed infra) remain predominately of the minority race and the adjoining school districts remain predominately of majority race, then Negroes will remain educationally isolated and in de facto apartheid communities.

State and local residence requirements attach numerous other public rights and privileges to the land. One must be a resident to enter the community hospital, receive welfare payments, and even to check a book out of the local public library. A comprehensive list of public services which depend upon residence would cover most aspects of local community life.

> "Access of the Negro to decent housing is becoming the vortex around which his other rights revolve. Without housing in areas of his choice, the right of his child to an unsegregated school is meaningless; his right to a

> job will be impaired; his right to move and to secure shelter in a decent neighborhood will be an empty shell." Abrams, **The Housing Problem**, in Daedalus 64, 72 (Winter 1966)
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> ". . . lack of housing opportunities lies at the heart of the Negro's other social problems. The discriminatory practices which confine him to the central city work at the same time to bind him to poor schools and to a generally unhealthy environment." Lord, **Equal Opportunity in Housing**, 9 (1966)

We turn now to consider how respondents and other suburban developers make use of the state and local requirements tying rights and privileges to residence in order to discriminatorily deprive petitioners and others of exercising those rights and privileges.

Despite modern communication and transportation people especially in suburban areas conduct much of their day-to-day life within a circumscribed area. This is recognized by the suburban developer and his product is not a house but a community. He sells not a "cabin in the pines" but a comprehensive local society. He offers a "planned community" with churches, schools, parks, recreation centers and convenient access to main roads and transportation. Every such development includes a "shopping mall," todays equivalent of a town square.

The key promotional word is "exclusive" succinctly expressing "you can keep your child out of an integrated school by moving to the suburbs." For profit or personal reasons he is motivated to exclude minority groups. His purpose is not to deprive the discriminated class from purchasing a house, but to exclude them from the community and the community life. By excluding a Negro from obtaining a residence within the community he effectively excludes him

from the local public schools, local governmental offices, local parks and recreational facilities, etc. This is the aim to keep the minority group off the local municipal and school bus, out of the local little league baseball and soap box derby and away from the convenient shopping mall within "smart shops" and "attractively landscaped court".

It is living and not owning. It is presence and not possession. It is entering into the community with its composite personal interrelations that is objected to by the discriminator. The old phrase, "from the other side of the tracks" is illustrative of the concept. A house on the other side of the tracks may only be 100 yards away, nevertheless, it is cut off and not part of the community. However, a house on the "right side of the tracks" even though further away is part of the community.

If the petitioners here had expressed the intent to merely acquire the ownership of a house in respondents' subdivision with the purpose that a member of Mrs. Jones' family who are white would live in the house, one can speculate that the respondents would have made the sale. If a white family had sought to purchase a house from the respondents and if they had obtained financing from the Negro bank, again this would not have been likely to prevent the sale. These hypotheses are proposed to demonstrate that the end sought by the developer of a suburban community is not exclusion of Negro interest in real estate but rather the exclusion of Negro presence within the community. A person may own houses in several different communities but he is a resident only in the community in which he lives.

The membership card to a local community is a residence. Without this admission card one can partake neither in the responsibilities nor the benefits of the community. By virtue of the State's residence requirements suburban developers control that membership card.

In **United States v. Guest**, 383 U.S. 745, 16 L.Ed.2d 239, 86 S.Ct. 1170, this court stated the standard of state involvement as follows:

> ". . . [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." Supra, (U.S.) l.c. 755 and 756.

The action of government here is parallel to the action of government in the **Steele v. Louisville and Nashville Railroad Company**, 323 U.S. 192, 89 L.Ed. 173, 65 S.Ct. 226.

Justice Murphy, in his concurring opinion expressed it thus, (U.S.) l.c. 208:

> "Congress, through the Railway Labor Act, has conferred upon the union selected by majority of the craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representatives shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution."

Also: **Brotherhood of Railway Trainmen v. Howard**, 343 U.S. 768, 96 L.Ed. 1283, 72 S.Ct. 1022, a suburban developer may be "essentially a private organization" but state and local laws have conferred on him power to bind all mem-

bers of a community. He therefore cannot act "so as to ignore rights guaranteed by the Constitution."

In the case of **Hawkins v. North Carolina Dental Society,** 4 Cir., 355 F.2d 718, the court considered the issue of whether the discriminatory membership practices of the North Carolina Dental Society and its regional associates constituted denial of equal protection of the laws.

At the time the suit was initiated state statutes required that six members of the State Board of Dental Examiners be elected by the Society. The Society also participated by virtue of statute in the State Medical Care Commission and the Mental Health Council. During the pendance of the suit these statutes were modified and eventually repealed.

The court stated, supra, l.c. 721, 722:

> ". . . it clearly appears that effective control of the practice of dentistry in North Carolina is in the Society. With respect to dentistry, the legislature leans heavily upon the Society. Its recommendations as to legislation are accepted, and embarrassing legislative recognition of its authority readily eliminated at its request. At the same time, while the statutes have undergone normal change at the Society's behest, there is no evidence of any change in its practical power to control the selection of the dental members of North Carolina's Boards, Commissions and Councils, * * * An organization vested by statute with the power to control, or even to substantially, influence, the selection of state officers functions as an arm of the state."

The court stated that the Dental Society "appears to be functioning clearly as the agent of the state in the selection of dental members of the state's boards and commissions." Supra, l.c. 722. The court, however, did not premise its holding upon this finding. It further stated, supra, l.c. 722:

> "It is enough that North Carolina in some of its manifestations has involved itself in Society's activities, and its Society's exercise of its powers of practical control or significant influence in the selection of state officials is a public function performed under the general aegis of the state."

The court held the society's activities to have the "character of state action and that its racially exclusive membership practices contravene the Fourteenth Amendment."

It is legal and reasonable for the state to provide that members of a professional examining board will be selected by the members of the professional society. The members of the North Carolina Dental Society, however, joined to the reasonable state requirement discriminatory membership practices which were in themselves private. Were it not for the combining of the two elements the practice of the Society would likely be outside the reach of the Fourteenth Amendment. The members of the Dental Society, however, used the reasonable state requirement as a means of denying Negroes a voice in the selection of state officials affecting the dental profession.

A community or neighborhood is a society. The right to receive benefits and to participate in the government of that society, which is public and not private, depends upon one's having membership in the society. The membership card in this context is residence.

Respondents exercise practical control over the ability of petitioners to exercise numerous constitutionally guaranteed rights and also significantly influence the selection of public officials and political actions. Without the residence controls imposed by the state respondents could not exercise such powers.

The control exercised by respondents and other suburban

developers effects large areas and many persons. It achieves de facto almost everything that express segregation laws would.

A parallel exists between the Union of South Africa and communities within the United States where freedom of residence does not exist. The Union of South Africa by positive law requires segregation. In that nation there exists apartheid de jure. In many American communities there exists apartheid de facto. Although the first exists as a result of an active official policy and the second exists as a result of a passive official policy, the practical effect of both systems is the same.

"The official and most widely accepted mean [of apartheid] refers to the 'separate development' of the 'races', each according to its own genus or inherent characteristics, in geographically deliniated areas." **South African Apartheid Legislation,** 71 Yale L.J. 1, 2.

The main purpose of the South African statutes is to provide for the physical separation of the races. Supra, l.c. 16 et seq. In South Africa the Group Areas Act establishes separate areas in which each race must dwell and do business. The purpose of the act is to prohibit residential intermixing. Supra, l.c. 18, 21.

The South African statutes not only provide for the separation of white from non-white, but also provides special systems for governing Africans in the areas to which they are relegated. Supra, l.c. 29. Apartheid de facto can produce the same effect. Where residential patterns produce a physical separation of the races the result can lead to municipal governments where the citizenry is of one race and such political units exist side by side with other political units where the citizenry is almost entirely of the opposite race. Political boundaries have been drawn manifesting generations of discriminatory housing patterns.

Within St. Louis County wherein respondents do business there are numerous cities and towns. One of these is the city of Kinloch. The population of Kinloch is 100 percent non-white. Kinloch is completely surrounded by two other municipalities, Berkeley and Ferguson. The percentage of non-white population of Berkeley is 0.6 percent. The percentage of non-whites in Ferguson is 0.1 percent. Of the 703,532 people in the county only 2.8 percent are non-white. U. S. Bureau of the Census, United States Census of Population: 1960; **General Population Characteristics, Missouri,** Final Report, PC (1)—27B, Table 13.

De facto apartheid is also manifest in the public school districts within St. Louis County. School districts in Missouri are separate political subdivisions from cities and counties. School districts within St. Louis County may be formed without regard to the boundaries of other political subdivisions. Chapter 162, RSMo Supp. 1965. The community of Kinloch is also educationally isolated. The Kinloch school district which enrolls 1384 pupils is 100 percent Negro. The Ferguson-Florissant school district to the east and north of Kinloch enrolls 17,210 pupils; only 225 are Negro. The Normandy school district to the south and east enrolls 7,995 pupils; only 251 are Negro. The Hazelwood district to the north enrolls 15,608 pupils; only 28 are Negro. The Jennings district to the east has 100 percent white enrollment. United States Departmbent of Health, Education and Welfare Office, Inventory of Public School Systems, Fall 1966.

Whether the community is apartheid de jure or apartheid de facto, either results in separation in schools, hospitals, libraries and other public facilities. Such separation universally results in inferior services for the minority group. Separate will never be equal. **Brown v. Board of Education,** 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686. **Open Housing Meets My Old Kentucky Home: A Study of Open Housing With**

Special Attention to Implications for Kentucky, 57 Ky. L.J. 140, 163 et seq.

The quality of education offered in Negro schools is inferior to the quality of education offered in white schools. This is true from the standpoint of the poor physical facilities, inferior educational programs, and less qualified teachers. The identity with such an educational system causes problems of self-esteem on the part of the Negro. Problems created by the inferior education and the lack of self-esteem result in Negro students who are educated in predominately Negro institutions performing poorly academically. Such poor academic performance is a cause of Negroes earning less, and being employed in less responsible positions than comparably educated whites. The U.S. Civil Rights Commission expressed it as follows, U.S. Civil Rights Commission, **Racial Isolation in the Public Schools** (1967).

> "There are some noticeable differences in the quality of school facilities available to Negro and white students in the Nation's metropolitan areas. **The Equality of Educational Opportunity** survey reported that although Negro and white children were equally likely to attend schools with libraries, whites more often attended schools with more library volumes per student. White students also were more likely to attend schools which had science laboratories." l.c. 92.
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> "The survey reported that whites more often were in schools which had advanced courses in particular subjects, such as science and language, they also were more likely to be in schools with fewer pupils per teacher. In most cities studied by the Commission it was found that schools with nearly all-Negro enrollments were overcrowded more often than nearly all-white schools. This

often resulted in the establishment of classes in temporary structures—sometimes in the basement of churches or other public buildings." l.c. 92 and 93.

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"Negro students, . . . were exposed less often than white students to teachers whose college major was in an academic subject—mathematics, science, or literature." Negro students also were more likely than whites to have teachers with a low verbal achievement level, to have substitute teachers, and to have teachers who are dissatisfied with their school assignment." l.c. 92, 93. Also see: U.S. Office of Education, **Equality of Educational Opportunities**, James S. Coleman et al. (1967), pp. 70, 73, 78, 100, 140, Tables 2.21.4, 2.21.8, 2.21.13, 2.24.2, 2.33.8 respectively.

"Young Negro children often tend to reject their own skin color, and to have problems of self-esteem • • • the racial composition of schools can serve either to overcome or to compound these problems of low self-esteem." l.c. 103.

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"In part, the relationship between racially isolated schools and poor performance and low self-esteem is based upon the fact that predominantly Negro schools are generally regarded as inferior by the community." l.c. 104.

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"At the Commission hearing in Rochester, Franklyn Barry, 'Superintendent of Schools in Syracuse, N.Y., testified that in such schools, teachers often 'average down' their expectation of the students." l.c. 105.

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"The environment of schools with a substantial ma-

jority of Negro students, then, offers serious obstacles to learning. The schools are stigmatized as inferior in the community. The students often doubt their own work, and the teachers frequently corroborate these doubts. The academic performance of their classmates is usually characterized by continuing difficulty. The children often have doubts about their chances of succeeding in a predominantly white society and they typically are in school with other students who have similar doubts. They are in schools which, by virtue both of their racial and social class composition, are isolated from models of success in school." l.c. 106.

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"The time spent in a setting of racial isolation or desegregation has an impact on student attitudes and achievement. The longer Negro students are in racially isolated schools, the greater the negative impact is likely to be. The cumulative effect of isolation also extends to income and occupation." l.c. 106.

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"The cumulative effect of desegregation was reflected in data from the **Equality of Educational Opportunity** survey. * * * It shows a consistent trend toward higher academic performance for Negro students the longer they are in school with whites. * * * Disadvantaged Negro children generally perform at higher levels if they have been in school with whites for some time, regardless of the present social class level of their classmates. They perform at even higher levels if, instead of simply being in schools with whites whose family background is the same as theirs, they are in school where the students are from families of a higher educational background." l.c. 106.

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"The cumulative effect on attitudes is similar. Negro students who had contact with whites since the early elementary grades are more likely to feel able to affect their own destiny than those who have not had that experience." l.c. 103-108; Also see: l.c., appendices, p. 62 Table 3.5.

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"The cumulative effects of education extend in later life to differences in income and occupation. Negroes with levels of education similar to whites do not earn similar amounts of money or hold similar jobs. These differences have been attributed both to employment discrimination and the quality of education." l.c. 108.

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"Negro adults who experienced desegregated schooling tend to have higher incomes and more often hold white-collar jobs than Negro adults who attended isolated schools. These differences are traceable to the higher achievement levels of Negroes from desegregated schools, and, in part, to the fact that association with whites often aids Negroes in competing more effectively in the job market." l.c. 114.

Housing discrimination severely impairs the geographic mobility of an individual which is often a prerequisite to occupational mobility.

It requires no documentation that a major manifestation of mobility in the United States has been the movement of business and industry from large cities into suburban areas, as well as the movement of population from major cities to the suburbs. St. Louis County, the origin of the litigation in question, had a population of 703,532 in 1960. Of this number only 298,671 resided in 1960 in the same house that they occupied in 1955. Fully 178,927 of the per-

sons living in St. Louis County in 1960 had lived in a different county in 1955. U. S. Bureau of the Census, **Census of Population 1960, Missouri General Social and Economic Characteristics.** Table 82, page 27-269.

The expansion of employment opportunities in the county is illustrated by a comparison of salient data for 1950 and 1960. In 1950 the total **male civilian labor force** residing in St. Louis County was 118,082 of whom 115,595 were employed. U. S. Bureau of the Census: **1950 Census of Population, Volume 2, Characteristics of the Population, Part 25, Missouri.** Page 25-133, Table 43. In 1960, the total male civilian labor force residing in St. Louis County had grown to 189,325 and the number of employed males had risen to 185,255.

Not all of the employed persons residing in St. Louis County were necessarily employed in the county, but it is fairly evident that the growth in population within the county was correlated to the growth of industry and commerce within the county. It is, therefore, instructive to note that although all of the foregoing figures represent statistical increases from 1950 to 1960 the non-white population of the county was relatively static during the decade. In 1950, the non-white population was 17,026. U. S. Bureau of the Census, **Census of Population 1950, Missouri General Characteristics,** Table 42, at page 25-118. In 1960, the non-white population was 19,881. U. S. Bureau of the Census, **Census of Population 1960. Missouri General Social and Economic Characteristics.** Table 82, at page 27-269.

The minimal increase in the non-white population is not caused by a lack of Negroes within the St. Louis area, as evidenced by the 1960 non-white population of the adjacent City of St. Louis: 215, 824. U. S. Bureau of Census, supra, pages 27-312.

There is objective information to demonstrate that the hindrance to the movement of Negroes into St. Louis County also serves as a hindrance to employment. Thus, the Human Development Corporation of metropolitan St. Louis has reported that its data, relative to efforts at placing Negroes in jobs (through the mechanism of Work Opportunities Unlimited, a private non-profit community action agency) ". . . indicated that during the period from March, 1967 through August, 1967, about 111 job vouchers . . . remained unfilled . . . lack of transportation was a sole or contributing factor in 34 of these cases, representing approximately 450 jobs." The bulk of the jobs were located in St. Louis County, and the persons who were unable to accept them were residents of St. Louis City. The problem is so acute that the U.S. Department of Housing and Urban Development is financing a system of mass transportation, to supplement existing public transportation services. **Mass Transportation Demonstration Project.** Bi-weekly Status Report No. 1, Human Development Corporation of Metropolitan St. Louis, October 30, 1967.

The lawful residence requirements of state and local governments are in themselves generally necessary and reasonable. It is not the requirements but the exploitation of the requirements by those who control the sale of land which is objectionable. This joint action of private upon state action is the means by which discriminatory land dealers are able to maintain de facto apartheid communities. The action of the state is a necessary ingredient to the venture. Without the state involvement the discriminatory community developer would be unable to deprive minority citizens of full exercise of their community civil rights.

When the state's residence requirements are combined with the deprival of the right to choose one's place of residence, the product is de facto segregation. The state be-

comes, albeit unintentionally, the collaborator in discriminatory property conveyances so as to effectively deny the equal exercise of the civil rights. If it were not for the state's action in tying free public education and other rights to residence, the discriminatory seller could not successfully deprive persons of them.

Local government provides numerous services: fire and police protection, sanitary disposal, water, lighting, health and medical services, transportation and roads, parks, museums, theatres, auditoriums, community centers, and market places etc. No one questions the right of all persons to use such public services without discrimination. But what has been overlooked especially by the district court here is that residence is the key to use of every one of these services. Without the right to acquire residence within the community of one's choice a person is as effectively deprived of the use of these services as one would be if government directly discriminated in the extending of services. To have the right to ride on a public bus is meaningless until one has the right to purchase a seat.

The right to acquire the residence of one's choice is as basic and as comprehensive as citizenship itself. For at the state and local level residence is synonymous with citizenship.

There is perhaps no more valuable single right than the right to select location of one's home. The family is the basic unit of every society and the home is the physical manifestation of this unit. When one obtains a home in a community, he does not merely purchase shelter from the elements but acquires a package of rights, privileges and responsibilities which are concisely expressed in the term "residence".

Therefore, respondents' refusal to consider petitioners'

offer to purchase solely on the grounds of race deprives petitioners of equal protection of these rights.

II.

Petitioners' first amended complaint states a claim upon which relief may be granted because respondents' refusal to consider petitioners' offer to purchase respondents' house solely on the grounds of race, deprived petitioners of rights guaranteed under 42 U.S.C., Section 1982 and the Fourteenth Amendment; there is significant state involvement in the respondents' activities, the respondents activities have a substantial impact on public interest, and the respondents act as a government instrumentality performing governmental functions.

Governmental involvement in discrimination by suburban developers has reached a level at which the restrictions of the Fourteenth Amendment apply. The activity of subdividing land and developing it into communities is one in which the state has become a joint and active participant.

Here, the state has participated in developing suburban communities by the action of the St. Louis County Council and the St. Louis County Planning Commission. These two bodies have regulated almost every aspect of a subdivision by the Zoning Ordinances of St. Louis County and the Subdivision Regulations of St. Louis County.

The population in St. Louis County has reached such a density, the county has enacted ordinances to promote effective use of the land. The Zoning Ordinances of St. Louis County, Missouri, Sections 1003.010-1003.420 regulate residential, industrial, recreational, and public areas of the county. The Zoning Ordinances also includes detailed instructions on subdivision direction signs and subdivision information signs. Section 1003.167, The Zoning Ordinance of St. Louis County, Missouri, amended 1966.

The St. Louis County Planning Commission has adopted extensive regulations governing the subdivisions of land in the unincorporated portions of St. Louis County. These regulations cover the respondents' developments in question here.

The stated purpose of these regulations is:

> ". . . to promote the health, safety, convenience and general welfare of the inhabitants of St. Louis County, and to guard against the creation of slums, blighted areas of deficit districts by assisting in bringing about the co-ordinated, efficient and economical development of the unincorporated portions of the county the following regulations and minimum standards have been adopted by the St. Louis County Planning Commission". **Subdivision Regulations, St. Louis County Planning Commission,** Section 1005.020.

Section 1005.020 further suggests that each subdivider of land confer with the Commission before preparing the preliminary plan in order to become familiar with the proposals of the official master plan affecting the territory in which the proposed subdivision lies.

Every subdivision of land within the unincorporated area of St. Louis County must be submitted to the Commission upon a plat for their approval or disapproval. If the Planning Commission approves it, it is then submitted to the County Council for its approval or disapproval. The plat cannot be recorded or lots sold until it is so approved. **Subdivision Regulations, St. Louis County Planning Commission,** Section 1005.040.

The Subdivision Regulations cover relation to adjoining street system, (Section 1005.080); streets in relation to railroads, superhighways and parkways, (Section 1005.090); street and alley width, (Section 1005.100); blocks, (Section

1005.110); lots, (Section 1005.120); exceptions in neighborhood unit developments, (Section 1005.130); building lines, (Section 1005.140); character of development, (Section 1005.150); parks, school sites, etc., (Section 1005.160); easements along streams, (Section 1005.170); improvements, (Section 1005.180); inspection and permits, (Section 1005.190); and variations and exceptions, (Section 1005.200).

Section 1005.190, Subdivision Regulations of St. Louis County, provides that the County Planning Commission staff shall make periodic inspections of the subdivision areas during the planning stages and as construction progresses. The County Highway Division shall inspect all streets and improvements within the street right-of-way and all storm sewers outside the Metropolitan St. Louis Sewer District during the progress of construction. The County Highway Division shall inspect private streets as a representative of the Planning Commission and report defects and substandard work. This section further provides that no construction can commence until a subdivision construction permit is obtained from the Planning Commission. The Planning Commission is to collect fees for subdivision permit fees and construction fees, and inspection fees.

Two sections which illustrate the county's awareness that a subdivision can be a community, much like a municipal corporation are the following:

> "**1005.150 Character of Dvelopment.**—The Commission shall confer with the subdivider regarding the type and character of development that will be permitted in the subdivision, and may agree with the subdivider as to certain minimum restrictions to be placed upon the property to prevent the construction of sub-standard buildings, control and the type of structures, or the use of the lots which, unless so controlled, would clearly depreciate the character and value of the proposed sub-

division and of adjoining property. Deed restrictions or covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future, provided, however, that such deed restrictions or covenants shall not contain reversionary clauses wherein any lot shall return to the subdivider because of a violation thereon of the terms of the restrictions or covenants. Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily maintained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities, for the proper and continuous maintenance and supervision of such facilities." **Subdivision Regulations, St. Louis County Planning Commission,** Section 1005.150.

"**1005.160 Parks, school sites, etc.**—In subdividing property, consideration shall be given to suitable sites for schools, parks, playgrounds and other common areas for public use so as to conform to the recommendations of the Commission in its adopted master plan or portion thereof of the County. Any provision for schools, parks and playgrounds should be indicated on the preliminary plan in order that it may be determined when and in what manner such areas will be dedicated to or acquired by the appropriate taxing agency." **Subdivision Regulations, St. Louis County Planning Commission,** Section 1005.160.

As the complaint states, the impact of the Alfred H.

Mayer Corporations' policy of not selling a house or lot to a Negro is the same in effect as if a municipal corporation would agree to exclude Negroes, and the cumulative effect of the Alfred H. Mayer Corporations' policy and that of other corporations developing housing projects in St. Louis County is the same as if the county had passed an ordinance forbidding the sale of a new house to a Negro. In St. Louis County only 2.8 percent of the residents are non-white. U. S. Bureau of Census, **U. S. Census of Population: 1960. General Population Characteristics, Missouri.** Final Report PC(1) —27B.

Considering respondents complex of subdivisions, the company's policy of not selling a house to a Negro will affect 2700 families who will ultimately occupy these houses. More people will live in these subdivisions than live in some Missouri Counties. Carter County has a population of 3,973 and Worth County has a population of 3,936. U. S. Bureau of Census, **U. S. Census, Population: 1960. General Population Characteristics, Missouri.** Final Report PC(1)—27 B. Table 13. There are hundreds of incorporated cities and towns in Missouri whose ordinances do not affect as many people. The issue before this court is not the narrow issue of the right of an individual property owner to exclude another individual from acquiring a particular house. Discrimination by a suburban developer unlike discrimination by an individual has the effect of excluding Negroes from an entire community.

A suburban developer creates a subdivision as a business venture. This subdivision will develop into a community possessing many of the attributes of a municipal corporation. The community and its developer, by virtue of these functions, becomes a governmental instrumentality which performs governmental functions.

The developer performs the same functions that are per-

formed by a municipal planning commission. In addition he puts into reality that which he plans, and he further provides for the perpetual maintenance of the community created. The Articles of Incorporation of Paddock Hills corporation on record with the Missouri Secretary of State provides in Section 8 thereof as follows:

> "EIGHTH: The purposes for which the corporation is formed are as follows: To acquire by purchase, lease or otherwise, and to improve and develop real property; to erect dwellings, apartment houses, and other buildings, private or public of all kinds, and to sell or rent the same; to lay out, grade, pave and dedicate subdivisions, lots, areas, tracts, roads, streets, avenues, highways, alleys, courts, paths, walks, parks and playgrounds; to buy, sell, mortgage, exchange, lease, let, hold for investment or otherwise, use and operate, real estate of all kinds, improved or unimproved and any right and interest therein; and to do all things which may be necessary for or in the best interests of the business of this corporation."

The developer plots the community establishing the location of streets, restrictions on construction, reserving areas for churches, schools, and mercantile centers, laying out parks and recreational areas, etc. The more affluent the community the more numerous and varied are the public facilities. One may find lakes, swimming pools, tennis courts, golf courses, community centers, etc.

Having planned and constructed such a community the suburban developer provides for its perpetual maintenance by establishment of a board of trustees which has numerous powers expressed in a trust agreement which binds all the property in the community.

The St. Louis County Subdivision Regulations expressly

provide for the "proper protection and maintenance of the development in the future."

> "Deed restrictions on covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future . . . Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily maintained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities for the proper and continuous maintenance and supervision of such facilities." **Subdivision Regulations, St. Louis County Planning Commission,** Section 1005.150.

By virtue of such regulations and trust agreement provisions, a suburban board of trustees is given the power to assess and collect money from the residents of the community in order to maintain the common facilities and services within the community. This may include not only the maintenance of streets, sewers, water systems, parkways and other physical features, but may also include police and fire protection. It is not uncommon for suburban developments to employ "watchmen" who are deputized by the local authorities and to provide them with all the equipment necessary to provide police services.

A town, or other governmental body, cannot prohibit the sale of real property upon discriminatory grounds by ordinance. Although respondents do not constitute a government body they are, through their powers and functions, a gov-

ernment instrumentality. The words of **Shelley v. Kraemer**, 334 U.S. 1, 12, 92 L.Ed. 1161, 68 S.Ct. 836, are apropos here:

> "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, Section 1978 of the Revised Statutes, 8 USCA Section 42, 2 FCA title 8, Section 42, derived from Section 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:
>
> 'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'
>
> It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of Buchanan v. Warley (US) supra, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: 'The Fourteenth

> Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.' "

In **Marsh v. Alabama**, 326 U.S. 501, 505, 90 L.Ed. 265, 66 S.Ct. 276, this court stated:

> ". . . it is clear that had the people of Chickasaw owned all the homes and all the stores and all the streets and all the sidewalks and those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press, religion simply because of single company has legal title to all the town?"

The court further noted, supra, l.c. 506:

> "Ownership does not always mean absolute dominion more an owner for his advantage opens up his property for the use of the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

Although the town of Chickasaw was a company town owned by the Gulf Ship Building Corporation, the court considered its operation "essentially a public function", supra, l.c. 506. Like Chickasaw in **Marsh** the series of Paddock developments in St. Louis County are suburbs of the larger city and they operate as an "essentially a public function", not "differently from any other town". Respondents' suburban developments have all the characteristics of any other town. Therefore, they are responsible under the Fourteenth Amendment not to discriminate as to the rights to acquire, enjoy, own and dispose of property. Respondents have the

same constitutional obligations as any other governmental body or agency.

The Fourteenth Amendment prohibits a state from making and enforcing any law which denies to any person within its jurisdiction the equal protection of the laws. The United States Supreme Court has always considered the purpose of the Fourteenth Amendment to prohibit the more sophisticated methods of denying a person his constitutionally guaranteed rights and privileges.

In **Terry v. Adams**, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, the Court reversed a Court of Appeals decision holding that there was no constitutional or congressional bar to the admitted discriminatory exclusion of Negroes because Jaybird's primaries were not to any extent state controlled.

Both the Jaybird Democratic Association, and the suburban developer, though not an official agency of the state, in effect, perform governmental functions. The Jaybird Association which held a primary election before the Democratic primary, held precisely the kind of election that the Fifteenth Amendment was enacted to prevent. The suburban developer, who performs governmental functions, excluded a citizen from a community because of his race. Like the Jaybird primaries the suburban developers' activities have a substantial impact on public interest. Here, as in Terry v. Adams, supra, we must look at the substantial impact of this discrimination on public interest and not be deceived by the form of that discrimination.

> ". . . It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election. . . . It is immaterial that the state does not control that part of this elective process which

it leaves for Jaybirds to manage. . . .'' **Terry v. Adams**, 345 U.S. at 469.

It, also, violates the Fourteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of an ordinance excluding Negroes from suburban developments. Here, too, it is immaterial that the state does not control the policy of the suburban developer, but leaves it for a private corporation to manage.

CONCLUSION.

Therefore, upon the foregoing arguments and authorities the Missouri Commission on Human Rights respectfully submits that the order below sustaining respondents' motion to dismiss should be reversed and the cause remanded for trial.

Respectfully submitted,

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1967

JAN 25 1968
JOHN F. DAVIS, CLERK

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* AND APPENDIX FOR NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS

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IN THE

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* AND APPENDIX FOR NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AND THE AMERICAN JEWISH CONGRESS

Interest of the *Amici*

This brief is sponsored by four national organizations which have long been deeply involved in and concerned with the danger to our democracy arising out of discrimination

and segregation in housing. All have been involved in education and litigation aimed at strengthening the machinery for combatting this evil badge of slavery. The National Committee Against Discrimination in Housing, The National Association for the Advancement of Colored People, The Anti-Defamation League of B'nai B'rith and the American Jewish Congress are united on the need for insuring that government and private programs affecting housing do not extend and indurate existing patterns of racial segregation in housing.

The harsh fact is that the pattern of black ghettos in our major cities is spreading rather than abating and the growing rings of lily-white suburbs which enclose our central cities make it clear that there is an increasing urgency in the need for mobilization of every force of government as well as of private industry to deal with the problem. Watts, Hough, Rochester, Harlem, Bedford-Stuyvesant have joined with other racial ghettos to make clear the imperative need for speedy federal action to help break down the walls of housing prejudice and discrimination which have brought about these explosions of violence and hatred. The federal devices which are at hand must be used now. Builders of white suburban communities must not be allowed to spread the plague of housing segregation, a plague which endangers the very roots of our free democracy, simply because their state has failed to adopt fair housing legislation and they have elected to eschew use of federal aids in order to keep their newly built housing projects "exclusive." Every such action by a private builder lays the base for more Wattses.

The organizations sponsoring this brief believe that since 1866 there has been a federal law which bars racial discrimination in the sale or lease of real property. They believe that law must be enforced if we are to begin to move forward in preserving our democracy, in implementing the promise of equality of opportunity which is a fundamental aspect of the American dream.

The *amici* are indebted to Kenneth B. Clark, Isidore Chein and Professor Stephen Berger for invaluable aid in providing them with the material contained herein on the psychological and sociological impact of racial segregation in housing on those immured in our racial ghettos. They wish also to acknowledge the help provided, in addition to those listed on the brief, of Robert Van Lierop of the NAACP who assisted in the legal research on which the brief is based.

Opinions Below

The opinion of the Court of Appeals (A.43a-66a)* is reported at 379 F. 2d 33. The memorandum opinion of the District Court for the Eastern District of Missouri is reported at 225 F. Supp. 115 (A 15a-41a).

Jurisdiction

The judgment of the Court of Appeals was entered on June 26, 1967. The petition for writ of certiorari was filed on September 22, 1967, and granted on December 4, 1967. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

* References to the Appendix containing the relevant entries in the proceeding below, the relevant pleadings and opinions below and the judgment and decision below, are designated by A.

Constitutional Provisions and Statutes Involved

Sections 1 and 2 of the Thirteenth Amendment to the Constitution.

Sections 1 and 5 of the Fourteenth Amendment to the Constitution.

The Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 18 of the Enforcement Act of May 31, 1870 (Civil Rights Act of 1870), ch. 114, 16 Stat. 144, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871 (Civil Rights Act of 1871), ch. 22, 17 Stat. 13, codified in Title 42, U.S.C. Sec. 1983.

All these are set forth in the appendix hereto (*infra,* pp. 105-115).

Questions Presented

1. Does Section 1982 of Title 42 of the United States Code, derived from the Civil Rights Act of 1866, prohibit racial discrimination in the sale or lease of real property and, if so, is this section constitutional?

2. Is there sufficient state action by respondents demonstrated by the allegations in the complaint herein to establish violation of the equal protection clause of the Fourteenth Amendment?

Statement of the Case

This case was filed in the United States District Court for the Eastern District of Missouri seeking relief under the Civil Rights Acts of 1866, 1870 and 1871, codified in 42 U.S.C. Secs. 1981, 1982 and 1983, and under the Thirteenth and Fourteenth Amendments to the Constitution directly. The District Court had jurisdiction of the cause under 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 1331, 1337 and 1343.

Inasmuch as this case arises from the affirmance by the Court of Appeals (A. 66a) of the order of the District Court (A.14a.) sustaining the respondents' motion to dismiss petitioners' first amended complaint for failure to state a claim upon which relief could be granted (A. 14a), the facts pleaded by petitioners in their first amended complaint (A. 3a-13a) must be taken as true.

Petitioners Joseph Lee Jones and Barbara Jo Jones are husband and wife who, in June of 1965, answering an advertisement in the St. Louis Post-Dispatch, went to a subdivision known as Paddock Woods in St. Louis County, Missouri, in order to consider the purchase of a lot and home. After inspecting the display houses, petitioners decided that a particular type of home was well suited to their needs, convenient to their places of employment with agencies of the Government of the United States, and within their ability to pay (A 5a-7a, 12a).

Paddock Woods is a subdivision which includes more than 100 projected homes with more plots to be opened, owned and developed by the Alfred H. Mayer Company, a corporation in the business of developing subdivisions in St. Louis County, including not only Paddock Woods, but

neighboring subdivisions known as Paddock Estates, Paddock Meadows and Wedgewood. The ultimate result will be that Paddock Woods will be a suburban community of about a thousand people "living in an area chosen by defendants for development, residing in homes designed and built by defendants, driving on streets built by defendants" (A. ~~10a~~). Paddock Woods will be part of a larger community which will include similar adjacent developments built by the same developer which will house approximately 2,700 families. It will contain recreational facilities built by the developer for all these communities, a golf course and a tennis and bath club for the use, primarily, of the residents. Alfred Realty Company is a corporation licensed as a real estate broker by the State of Missouri which is the exclusive sales agent for the homes in these subdivisions. Alfred H. Mayer, also licensed as a real estate broker by the State of Missouri, owns a controlling interest in and is the managing officer and guiding policy maker of both Alfred H. Mayer Company and Alfred Realty Company. Paddock Country Club, Inc., is a corporation controlled by the other respondents, which operates a golf course for the use of residents of the "Mayer" subdivisions (A. 3a-5a, 9a-12a). The respondents will be referred to hereinafter at times simply as "the developers".

After petitioners Joseph and Barbara Jones had picked out a lot and home in Paddock Woods which they wished to order and purchase, the respondents refused to sell them the house and lot because of the fact that Joseph Jones is a Negro, and because it is the respondents' general policy not to sell said houses and lots to Negroes (A. 7a).

Summary of the Argument

Section 1982 of Title 42 of the United States Code which guarantees to all citizens of the United States the same right as white citizens to inherit, purchase, lease, sell, hold and convey real and personal property is a portion of Section 1 of the Civil Rights Act of 1866. It was enacted soon after the Thirteenth Amendment which forever barred slavery and involuntary servitude in the United States, and two years before the Fourteenth Amendment.

The Thirteenth Amendment, which specifically authorized Congress to enact appropriate legislation for its enforcement was not intended to, nor did it by its terms, deal only with state action. When it was enacted and adopted it was viewed by those who had approved it, as abolishing not just enforced service of one person for another but as a guarantee to all citizens, including the emancipated Negroes, of the outlawing of all of the badges and incidents of slavery and a declaration that all citizens were free men protected by the federal power in their possession of the fundamental rights necessary for a life of freedom. These fundamental rights included the right to purchase and hold real and personal property free from discrimination based on race or previous condition of servitude.

The debates in the Congresses which enacted the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866 demonstrated that the framers of the Amendment and the Act clearly intended the guarantees and protections of both to operate not only against state action but also against private action aimed at denying or limiting the rights protected by those provisions. The plain and literal language of the Act itself also demontrates this purpose.

The Act has as its constitutional basis the specific authority granted to Congress in Section 2 of the Thirteenth Amendment as well as the implied powers needed to effectuate that amendment's goal. Its reenactment as Section 18 of the Civil Rights Act of 1870 gives it the additional constitutional authority of Section 5 of the Fourteenth Amendment which six judges of this Court have recently said authorizes congressional legislation directed against private action interfering with Fourteenth Amendment rights. *United States* v. *Guest*, 383 U.S. 745 (1966).

The reenactment of the Civil Rights Act of 1866 as a portion of the Civil Rights Act of 1870 was a reassertion by Congress of the need for and the constitutional validity of the 1866 Act, not intended or understood by Congress as in any way limiting its coverage or applicability. Those decisions which, in dicta, interpret the 1870 reenactment as limiting the 1866 Act to state action are in error. Similarly, nothing in Section 1983 of Title 42 of the United States Code or in its predecessor statutes justifies the conclusion reached by the trial court that that section spells out the sole and exclusive remedy for breach of the rights protected in Section 1982.

Racial segregation in housing is an immediate and pressing evil which, through denial of the right to purchase and hold real property free of racial discrimination, protected by Section 1982 against denial by any source, perpetuates one of the most onerous of the badges and incidents of slavery. This Court, which has never ruled on the specific issue of the applicability of this provision of the 1866 Act to private action, should now declare that the Act means what it says and is constitutionally applicable to bar racially discriminatory sales of real property.

At the very least, this Court should find that, in the facts alleged by the complaint here under consideration, there is sufficient state action to require a ruling that the complaint states a cause of action under the Fourteenth Amendment. The involvement of the state in many aspects of the respondents' operations and the fact that respondents are performing the state function of establishing and governing a community and are using licenses granted by the state in the exercise of its public power to protect the public welfare, satisfies the state action requirement.

POINT I

Section 1982 of Title 42 of the United States Code, part of the Civil Rights Act of 1866 enacted under the authority of the Thirteenth Amendment, prohibits racial discrimination in the sale or lease of real property.

A. History of Section 1982

Section 1982 of Title 42 of the United States Code reads as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

It embodies one portion of Section 1 of the Civil Rights Act of 1866 which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding In-

> dians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[1]

This Act followed by less than four months the adoption of the Thirteenth Amendment which had been declared ratified and in force in December 18, 1865. That amendment consisted of two sections. Section 1 abolished slavery. It reads:

> Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 provides:

> Congress shall have power to enforce this article by appropriate legislation.

It was included as part of the amendment, in order "to remove all doubt and argument about the power of Congress" to abolish slavery, not only in name but in fact.[2]

1. Civil Rights Act of April 9, 1866, ch. 31, Sec. 1, 14 Stat. 27 (1866).

2. tenBroek, *Equal Under Law* (1965, Collier Books), at 177.

In explaining why the second section had been included in the amendment, Senator Lyman Trumbull of Illinois, Chairman of the Judiciary Committee, said on December 13, 1865 on the Senate floor:

> And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that men whose liberties are secured by it are deprived of the privilege to go and come when they please, to buy and sell when they please, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights; they would not be freemen without them. It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.[3]

The Civil Rights Act of 1866 was first passed by Congress in March of 1866. The Thirteenth Amendment had become law on December 18, 1865 abolishing slavery for all time, *Clyatt* v. *United States*, 197 U. S. 207, 217 (1905). When President Andrew Johnson vetoed this Act, both Houses of Congress overrode his veto and it became law on April 9, 1866. The Act declared and vindicated those fundamental rights which appertain to the essence of citizenship and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery, Civil Rights Cases, 109 U. S. 3, 22 (1883).

The Fourteenth Amendment which was approved by Congress in June of 1866 was not ratified and did not become a part of the Constitution until July 28, 1868, more

3. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

than two years after the adoption into law of the Civil Rights Act of 1866. That amendment contained a final Section 5 which was substantially similar to Section 2 of the Thirteenth Amendment reading:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

During the third session of the Fortieth Congress in 1869, the Congress approved the Fifteenth Amendment which was declared ratified on March 30, 1870. The first section of that amendment prohibited racial discrimination in voting. The second section, cast in virtually the same language as Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth, gave Congress power to enact appropriate legislation for its enforcement.

Thereafter, on May 31, 1870, Congress enacted a second Civil Rights Act[4] which dealt primarily with voting rights and also sought to protect the freed men from discrimination. Included in this Act as Section 18 thereof, was a provision reenacting the Civil Rights Act of 1866. This section read:

> *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

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4. Civil Rights Act of 1870, ch. 114, 16 Stat. 144 (1870).

B. The Thirteenth Amendment and "State Action"

A resolution for a constitutional amendment ending slavery was debated in the First and Second Sessions of the Thirty-Eighth Congress. The resolution that became the Thirteenth Amendment was debated and passed in the Second Session. It was approved by the Senate on April 18, 1864 and by the House on January 31, 1865. It was declared ratified and in effect on December 18, 1865.

The debates on the amendment made it clear that both proponents and opponents recognized that it did far more than merely sever the legal relationship of master and slave. Thus Rep. James F. Wilson of Iowa, in submitting the anti-slavery amendment in 1864, described the evils of the slave system in broad terms, saying:

> Legislatures, courts, Executives, almost every person holding political or social power and position in the southern States, were all arrayed on the side of slavery, and what they could not accomplish was turned over to the mob, which, without law, with abuse, indignities, cruelties, and hempen halters, did its work with fearful accuracy and terrible exactness.[5]

He went on

> It is quite time, sir, for the people of the free States to look these facts squarely in the face and provide a remedy which will make the future safe for the rights of each and every citizen.[6]

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5. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

6. *Ibid.*, at 1203.

Senator Henry Wilson of Massachusetts, later Vice-President under President Grant, said of the same proposal

> If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it, from the face of the nation it has scarred with moral desolation, from the bosom of the country it has reddened with the blood and strewn with the graves of patriotism.[7]

Since the Thirteenth Amendment involved the abolition of a form of private property, affecting deeply the fortunes of many people and striking out of existence millions of property, *United States* v. *Rhodes*, 27 Fed. Cas. 785, 788 (1866), it clearly affected the rights of those individuals who had formerly had and might continue or seek in the future to claim ownership of other human beings as chattels. Hence the relationship it deals with is one between private persons and it cannot be limited to situations involving "state action." There is no need, therefore, to establish "state action" as a condition of triggering the exercise of the rights it created or to invoke federal power and action. Even when this Court in the Civil Rights Cases, *supra*, was establishing "state action" as a prerequisite for invoking the protections of the Fourteenth Amendment and was, therefore, striking down the Civil Rights Act of 1875,[8] it also conceded that the Thirteenth Amendment was not a mere prohibition of State

7. *Ibid.*, at 1324.

8. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

laws establishing and upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States[9] and gave "power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure."[10]

Even in *Hodges* v. *United States,* 203 U. S. 1 (1906), where the majority of this Court reversed a conviction of a group of white men for terrorizing several Negroes to prevent them from working in a sawmill, on the ground that the federal civil rights statutes under which they had been indicted were improperly invoked because they could be invoked only against state action, it was conceded that the Thirteenth Amendment grants Congress power to adopt legislation directed against individual action.[11]

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9. Civil Rights Cases, *supra,* at 20. See also *United States* v. *Harris,* 106 U. S. 629 (1882); *Clyatt* v. *United States, supra.*

10. Civil Rights Cases, *supra,* at 20. See also, Gressman, *The Unhappy History of Civil Rights Legislation,* 50 Michigan Law Rev. 1323, 1324 (1952).

11. *Hodges, supra,* at 14, 16. It is submitted that the conclusion of the majority in that case is hardly one which this Court would reach today. The convicted defendants, white men, were convicted of having conspired to oppress, threaten and intimidate a group of Negroes to prevent them from working under contract at a sawmill. The majority struck down the indictment as exceeding the federal power in that it struck at private actions of individuals and not state action. It concluded that when Congress gave the freedmen citizenship it did not extend federal protection to them because it believed "that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes." At 20. History has shown how well the freedmen and their descendants have fared by "taking their chances with other citizens in the States" where they have lived. This decision is discussed below more fully at 18-20.

It is clear, therefore, that the Thirteenth Amendment cannot and has not ever been held by this Court to be limited to dealing with state action.

C. The Scope and Purpose of the Thirteenth Amendment

Examination of the debates in Congress demonstrates that the Thirteenth Amendment which, as has just been shown, unquestionably applies to individual conduct, was intended and understood by its framers and the Congress which approved it and submitted it to the states for ratification, as outlawing the institution of slavery and granting to Congress the power to bar any form of conduct, private or public, which maintained the institution in fact even though it was barred in law. The slavery to be abolished by the amendment was to include all of the incidents of the system which impaired and destroyed the civil rights of white persons. Both the supporters and opponents of the amendment assumed and declared that it went beyond the mere outlawry of personal bondage and guaranteed the emancipated Negro certain minimum rights which Congress would be enabled by the second section to safeguard and protect by legislation.[12] The remarks of Senators Trumbull and Wilson to this effect have been noted above. Jacobus tenBroek summarized similar remarks by other members of Congress on both sides of the issue during the debates on the amendments and the Civil Rights Act of 1866:[13]

> Beyond toppling over the corpse of slavery, most if not all the elements of congressional opposition asserted that the amendment would guarantee to the

12. Gressman, *supra*, fn. 10, at 1324-1325.

13. tenBroek, *supra*, fn. 2, at 162-63.

emancipated Negro a basic minimum of rights—equality before the Law, protection in life and person, opportunity to live, work and move about—and that Congress would be empowered to safeguard and protect those rights * * *

The case made out by the sponsors and supporters of the Thirteenth Amendment was no less explicit on this central issue. The amendment was presented not as one step in a series of steps yet to come, not as an act of partial fulfillment, not as the opportunistic achievement of a limited objective. It was exultantly heralded as "the final step," "the crowning act," "the capstone upon the sublime structure," the joyous "consummation of abolitionism." To the proponents of the amendment, though slavery was dead, the remote contingency of its resurrection had to be precluded; the incidents of slavery had yet to be obliterated; the emancipated Negro and his white friends had to be protected in the privileges and civil liberties of free men; and the federal power as the instrument for achieving these purposes had to be permanently assured * * *"

It is clear from the foregoing that the members of the 38th Congress who approved the Thirteenth Amendment believed that it would outlaw forever slavery and all of its indicia and attributes and that all free men would henceforth be guaranteed the fundamental rights needed for a life of freedom, equality before law, security of person and property, and the right to live and work and move about without check. And the second section of the amendment provided, accordingly, that Congress had and would exercise the power to enforce the constitutional guarantee.[14]

14. Howe, *Federalism and Civil Rights,* Civil Rights, The Constitution, and the Courts (1967, Harvard University Press), 30 at 46.

Reference is made above to the views expressed by opponents of the Thirteenth Amendment. This is done because it helps demonstrate that those who in the later debates on the Fourteenth and Fifteenth Amendments and the Civil Rights Acts of 1866, 1870 and 1871, insisted that the Thirteenth Amendment accomplished no more than to end the legal tie between master and slave and to outlaw involuntary servitude, were doing so only in order to seek to undermine and destroy the effect of that amendment and minimize or nullify the impact of the legislation and later amendments adopted to protect and implement what it sought to do. When they opposed it on the ground that it did precisely what its proponents wanted it to do, they necessarily cast doubt on the good faith of their efforts to read it narrowly, when they opposed further steps to carry out its mandate and purpose.

Despite the foregoing clear legislative history, this Court saw fit to accept the view of the opponents of the Thirteenth Amendment in at least two decisions, *Hodges* v. *United States, supra,* and *Corrigan* v. *Buckley,* 271 U. S. 323 (1926). In *Hodges, supra,* at 16, this Court said, "The meaning of this [the Thirteenth Amendment] is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these a condition of enforced compulsory service of one to another." And in *Corrigan, supra,* at 330, this Court said, "The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race."

But both of these cases are of doubtful validity today. *Corrigan* has been distinguished by this Court in *Hurd* v. *Hodge*, 334 U. S. 24, 28-29 (1948), when it reached a conclusion with respect to court enforceability of racial restrictive covenants diametrically opposed to that reached in *Corrigan*.

It is respectfully submitted that the views expressed in dissent by the first Mr. Justice Harlan in *Hodges, supra*, are far more consistent with the action of this Court in recent years, than the view expressed by the majority therein. Dealing with the question of the scope and meaning of the Thirteenth Amendment he said at 26-27:

> Before the Thirteenth Amendment was adopted the existence of freedom or slavery within any State depended wholly upon the constitution and laws of such State. However abhorrent to many was the thought that human beings of African descent were held as slaves and chattels, no remedy for that state of things as it existed in some of the States could be given by the United States in virtue of any power it possessed prior to the adoption of the Thirteenth Amendment. That condition, however, underwent a radical change when that Amendment became a part of the supreme law of the land and as such binding upon all the States and all the people, as well as upon every branch of government, Federal and State. By the Amendment it was ordained that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction"; and "Congress shall have power to enforce this article by appropriate legislation." Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its

incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, *without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom.* It went further, however, and, by its second section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the reestablishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any State or Territory of the United States. It therefore became competent for Congress, under the Thirteenth Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery *offenses against the United States,* punishable by fine or imprisonment, or both. [Emphasis added.]

It is clear from the foregoing that the few statements by way of dictum in the decisions of this Cou- to the effect that the Thirteenth Amendment's abolition of slavery and involuntary servitude is limited to a ban on enforced compulsory service of one to another and does not include a ban on public or private conduct which would preserve or continue any of the incidents of human slavery, are wholly without foundation either in the intent of Congress as expressed in the debates or in the understanding of the courts or the people at the time of its adoption.

D. The Congressional Debate on the Civil Rights Act of 1866

Soon after the Thirty-Ninth Congress convened in December, 1865, its members introduced a variety of bills to give explicit statutory support for the guarantees regarded as necessary if freedmen were to be given something more than parchment rights and freedom from only the forms of bondage. Representative Benjamin F. Loan of Missouri sponsored a resolution directing the Select Committee on Freedom to consider "legislation securing to the freedmen and the colored citizens of the States recently in rebellion the political and civil rights of other citizens of the United States."[15] Senator Henry Wilson of Massachusetts sponsored a bill declaring void all "laws, statutes, acts, ordinances, rules and regulations" establishing or maintaining "any inequality of civil rights and immunities" based on color or previous slavery in the rebel states.[16] Senator Charles Sumner of Massachusetts introduced bills against "all laws and customs * * * establishing any oligarchical privileges and any distinction of rights on account of color or race" in those states. They declared all persons in such states are recognized as equal before the law and gave the federal courts exclusive jurisdiction of all suits, criminal or civil to which a person of African descent was a party.[17]

Although these proposals died they are significant as showing a uniformity of approach by the draftsmen and

15. CONG. GLOBE, 39th Cong., 1st Sess. 69 (1865).

16. *Ibid.*, at 39.

17. *Ibid.*, at 91-95.

supporters of the Civil Rights Act of 1866 to the protection of the rights as humans and the essential needs of the freed men. These were in terms of the "full protection in the enjoyment of their inalienable rights," "equality of civil rights and privileges," equal rights before the law, the same civil rights as other citizens—in a word, equal protection of law for men's civil, that is, natural rights.[18]

Even before the 1866 Bill as such was introduced, Senator Lyman Trumbull of Illinois, Chairman of the Judiciary Committee, announced an December 19, 1865, the day after the Thirteenth Amendment was ratified, that he would introduce a bill modifying the Freedmen's Bureau in order to make personal rights more secure. This he later divided into two measures, one of which became the Civil Rights Act. Since it has been commonly thought that this measure was influential in determining the character of the first section of the Fourteenth Amendment, Trumbull's purposes stated in December are worth noting.[19] He outlined his objectives of:

> [(1)] quieting apprehensions in the minds of many friends of freedom lest by local legislation or *a prevailing public sentiment* in some of the states, persons of the African race should continue to be oppressed and in fact deprived of their freedom, and of (2) showing to those among whom slavery has heretofore existed that unless by local legislation they provide for the real freedom of their former slaves the Federal Government will, by virtue of its own authority, see that they are fully protected.[20] [Emphasis added.]

18. tenBroek. *supra*, fn. 2, at 176.

19. James, *The Framing of the Fourteenth Amendment* (1956, University of Illinois Press). at 50.

20. *Ibid.*

The bill that became the 1866 Act, S. 61, was introduced in the Senate by Senator Trumbull, on January 5, 1866.[21] From the first, it contained in its first section[22] the language here involved.

Senator Trumbull first expressed his view of Congressional power under the Thirteenth Amendment in the debate on the Freedmen's Bureau Bill, which was considered by the Senate just before it debated the Civil Rights Act of 1866. Making it clear that he was talking of both bills, he said

> If the construction put by the Senator from Indiana upon the amendment be the true one, and we have merely taken from the master the power to control the slave and left him at the mercy of the State to be deprived of his civil rights, the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound", and the promised freedom is a delusion.
>
> * * *
>
> I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation it may think proper, so that it be a means to accomplish the end.[23]

21. CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866).

22. *Ibid.*, at 211, 474.

23. *Ibid.*, at 322.

In opening debate on the Civil Rights Bill, Senator Trumbull said of the first section:

> This section is the basis of the whole bill. * * * Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. In my judgment, Congress has this authority.[24]

He went on:

> * * * I hold that we have a right [under the Thirteenth Amendment] to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. * * *[25]

Specifically referring to Section 2 of the Amendment, Senator Trumbull said (*ibid.*):

> * * * the clause of the Constitution under which we are called to act in my judgment vests Congress with the discretion of selecting that "appropriate legislation" which it is believed will best accomplish the end and prevent slavery.

The same view was expressed by Senator Jacob M. Howard of Michigan, a Radical Republican like Senator Trumbull, and a member of the Joint Committee of Fifteen established by the House and Senate in December 1865 under a resolution directing them to "inquire into the condition of the states which formed the so-called Confederate States of America and report whether they or any of them are entitled to be represented in either House of

24. *Ibid.*, at 474.

25. *Ibid.*, at 475.

Congress."[26] Senator Howard specifically rejected the narrow view of the Thirteenth Amendment, saying:[27]

> * * * I take this occasion to say that it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and the freedmen which is proposed to be exercised by the bill now under our consideration.

It was "easy to foresee," he argued, that the slave states would attempt to nullify mere emancipation and that hence more would be needed. Opponents of the bill, he said, argue that the Amendment does no more than cut the slave's "legal ligament" to his master

> * * * and there leaves him, totally, irretrievably, and without any power on the part of Congress to look after his well-being from the moment of this mockery of emancipation. Sir, such was not the intention of the friends of this amendment at the time of its initiation here and at the time of its adoption; * * * (*ibid*).

During the debate on overriding President Johnson's veto, Senator William M. Stewart of Nevada said:

> Although I am a strong advocate for local government, and extremely anxious that these matters should be attended to by the States as early as practicable, still I believe that it was the intention of those who amended the Constitution, as plainly indicated by that amendment, *to give the power to the General Government to pass any necessary law to secure to the freedmen personal liberty.* I believe that was the intention. I believe that is within the legitimate scope of legis-

26. CONG. GLOBE, 39th Cong., 1st Sess. 7 (1865).

27. CONG. GLOBE, 39th Cong., 1st Sess. 503 (1866).

> lation. I believe that power is in the General Government. I do not believe there is any constitutional argument against it that is worthy of serious consideration.[28] (Emphasis supplied.)

The debate in the House was opened by Rep. James F. Wilson of Iowa. On the matter of power under the Thirteenth Amendment, Rep. Wilson referred to Justice Marshall's well-known dictum in *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

He went on to say of the bill:

> The end is legitimate, because it is defined by the Constitution itself. The end is the maintenance of freedom to the citizen * * *. A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the possession of these rights insures him against reduction to slavery. This settles the appropriateness of this measure, and that settles its constitutionality.[29]

Rep. M. Russell Thayer of Pennsylvania said:

> For one, sir, I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering

28. *Ibid.*, at 1785.

29. *Ibid.*, at 1118.

> them a mere paper guarantee. And when I voted for the second section of the amendment, I felt in my own mind certain that I had placed in the Constitution and given to Congress ability to protect and guaranty the rights which the first section gave them.[30]

The debates on the 1866 Act reveal that the supporters of the bill not only believed that they had the power to give broad protection to the rights of the newly freed slaves and to secure for them and all the people of the United States, the essential rights of free men but also that they were doing just that in the legislation before them. The concept that the amendment and congressional action thereunder must be limited to the elimination of the forced service of one to another, the surface aspect of slavery, was held only by the minority which opposed both the amendment and the bill. The purpose of the majority was to give reality to the verdict of freedom flowing from the Civil War and the purpose of the minority was to nullify that verdict and to limit the goal to a reconstitution of the Union.

Thus, Senator Trumbull, in his opening speech on the bill, said that the bill would make Negroes citizens and thereby give them:

> The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman.[31]

30. *Ibid.*, at 1151.

31. *Ibid.*, at 475.

Later, he said:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; * * *
>
> * * * *the very object of the bill is to break down all discrimination between black men and white men.* (Emphasis supplied.)[32]

During the debate on passing the bill over President Johnson's veto, Senator Trumbull said that the civil rights protected by the bill were the "natural rights" belonging to all; he quoted Chancellor Kent as saying that "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property."[33]

Senator Trumbull's view that the bill barred all discrimination between white and black was echoed by Senator Howard when he said that "in respect to all civil rights * * * there is to be hereafter no distinction between the white race and the black race".[34]

Senate opponents of the measure held the same view of its thrust. Arguing now for the first time that the Thirteenth Amendment, including Section 2, had a narrow effect, they insisted that the bill before them went far beyond the power Congress had been given. But even they conceded that the Amendment and the bill applied to private persons

32. *Ibid.*, at 599.

33. *Ibid.*, at 1757.

34. *Ibid.*, at 504.

as well as the state. This view was expressed, for example, by Senator Garrett Davis of Kentucky who said:

> * * * this measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any "'ordinance, regulation or *custom,*" as well as by "law or statute." * * *
>
> But there are civil rights, immunities and privileges "which ordinances, regulations, and *customs*" confer upon white persons everywhere in the United States and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and *customs.* This bill proposes to break down and sweep them all away, and to consummate their destruction, and bring the two races upon the same great plane of perfect equality. (Emphasis added.)[35]

Supporters of the bill made no effort to deny this sweeping characterization of what they intended.

In the House, Representative Wilson, in his opening speech on the bill, defined civil rights, saying:

> The definition given to the term "civil rights" in Bouvier's Law Dictionary is very concise, and is supported by the best authority. It is this:

35. *Ibid.*, App. 183.

> "Civil rights are those which have no relation to the establishment, support, or management of government."

From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.[36]

Representative Thayer asked:

> What kind of freedom is that under which a man may be deprived of the right of going at his own volition from one place to another; may be deprived of the ability to make a contract; may be deprived of the ability to sell or convey real or personal estate; may be deprived of the liberty to engage in the ordinary pursuits of civilized life. * * *?[37]

Representative William Windom of Minnesota spoke to the same effect.[38]

Running through the debates is the determination of the leaders to embody in law the judgment against slavery spoken by the Civil War and to prevent its being reversed either immediately by the former rebel states or at any time in the foreseeable future by toleration of inequality. This view was well expressed by Rep. John M. Broomall of Pennsylvania:

> Mr. Speaker, it is alleged that this species of legislation will widen the breach existing between the two sections of the country, will offend our southern brethren. Do not gentlemen know that those who are most

36. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

37. *Ibid.*, at 1152.

38. *Ibid.*, at 1159.

> earnestly asking this legislation are our southern brethren themselves? They are imploring us to protect them against the conquered enemies of the country, who, notwithstanding their surrender, have managed, through their skill or our weakness, to seize nearly all the conquered territory. This is not the first instance in the world's history in which all that had been gained by hard fighting was lost by bad diplomacy.[39]

The purpose of the bill, then, was "to break down all discrimination between black men and white men".[40] *The debates make it clear that this aim was limited to discrimination by state action.* The whole concept that Congressional power under the amendments was limited to state action did not enter into the debates in Congress until 1870.

Once it is recognized that the intent behind the Thirteenth Amendment was to empower Congress "to pass any necessary law to secure to the freedmen personal liberty" and that the intent behind the first Civil Rights Act was to "break down all discrimination," there is no basis for limiting the act to state action. The Congress that adopted this act and the one that approved the Thirteenth Amendment were concerned with "liberty" in its broadest sense and were certainly aware that "discrimination" could be and was being achieved by private action. If it had intended to limit the act to state action, it could readily have expressed that intent in the statute in simple terms.

Undoubtedly, discriminatory state action was also within the contemplation of the supporters of the bill. The

39. *Ibid.*, at 1264.

40. CONG. GLOBE, 40th Cong., 1st Sess. 3611, 3671 (1867).

Black Codes enacted by the southern states after the end of the War had been recognized as an attempt to keep the freedmen in effective bondage[41] and the 1866 Act was aimed at nullifying them. But it cannot be concluded from this that state action was the sole target of the act. *This distinction does not appear in the debates or in the statute itself.*

The men who wrote and made into law the Thirteenth Amendment and the Civil Rights Act of 1866 were well aware of the role played in protection of private property by state power as well as by private force. They were, of course, familiar with the legal machinery set up by the state to protect private property in human beings. And they knew the interrelationship between private action to protect property and state action for that purpose. They were well aware of the effort being made to use state power to buttress private action individually and by conspiracies, to salvage as much as possible of the institution of slavery. In their discussion of the Civil Rights Act of 1866 they made it clear that the Act was aimed at both prongs of the effort of the slave holders to preserve their power over the freed slaves, to use them for servile labor and to deny them the rights essential for the maintenance of their freedom. They sought by the act to bar forever any possible recrudescence of the evil of human slavery. The supporters of the bill denounced the Black Codes. But far from confining themselves to the elimination of these efforts to reinstitute aspects of slavery through the use of state power, they spoke of the protection of broad rights such as the right of personal security, the right of personal liberty

41. tenBroek, *supra*, fn. 2, at 180-81.

and the right to acquire and enjoy property, against any invasion. They spoke not just of law, statute, ordinance and regulation, but also of custom and usage. The right of personal security is one that requires protection primarily against individual conduct. So, too, our country has learned that the right to acquire and enjoy real property is one which requires protection primarily against individual conduct. The inclusion of both rights, to personal security and to acquire and enjoy real property, in the rights declared to be under the protection of the act and the Thirteenth Amendment is a clear demonstration of the intent of the authors of the Act and those who approved it over the presidential veto, to extend the federal power to the protection of those rights, as a necessary aspect of the end of all the incidents and vestiges of slavery.[42]

In the Civil Rights Cases, *supra,* Mr. Justice Bradley speaking for the Court acknowledged the need for interplay and cooperation between state and private power in the maintenance of slavery and conceded that the Thirteenth Amendment empowered Congress to deal with both aspects of the problem. He said at 20:

> It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes

42. McPherson, *The Struggle for Equality* (1964, Princeton University Press) at 341.

> Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. * * *

While the Court then rejected the argument that discrimination in places of public accommodation is such a badge of slavery (erroneously, we believe) it went on to say at 22:

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restrained of his movements except by his master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution * * * Congress, as we have seen. by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities; the necessary incidents of slavery, constituting its substance and visible form and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

Thus this Court, even while limiting the impact of the Fourteenth Amendment, conceded that the Thirteenth Amendment extended federal protection to the right of all persons to purchase and hold property free from discrimination based on race and that this right was federally protected from invasion by private persons as well as the State under the Thirteenth Amendment and the 1866 Act adopted under its authority.

E. The Meaning and Effect of the Act

Section 1 of the Civil Rights Act of 1866 opens with a declaration that all persons born in the United States except subjects of a foreign power and Indians not taxed are citizens of the United States. Thus all the former slaves were made citizens as were those who had been freed before the Civil War or were descendants of such free Negroes born in the United States. And the grant of citizenship was of federal citizenship, not citizenship of the state in which each freed Negro resided. This grant applied everywhere in the United States, not just in the rebel states. That this declaration was of utmost importance is demonstrated by the fact that at the time of the adoption of the act the State of Indiana had a constitutional provision barring any Negro or mulatto from coming into or settling in the State[43] and voiding all contracts made with any Negro or mulatto coming into the state.[44] And the Indiana legislature had passed an act to enforce this article of the state constitution on June 18, 1852. 1 G. & H. 443. See *Smith* v. *Moody*, 26 Ind. 299-300 (1866).

The fact that the act speaks in terms of "citizenship of the United States" is also significant. Here is a declaration by Congress, under the authority of the Thirteenth Amendment that there can be a federal citizenship, not merely a state citizenship, and that this federal citizenship carried with it rights which were not dependent on the attributes of each citizen's home state but survived independently of such state citizenship attributes and limitations. Here was a rejection of the supposition that the destiny of slavery within and between the states was to be

43. Indiana State Commission, Article XIII, Sec. 1 (1851).

44. *Ibid.*, Sec. 2.

determined by their law and not by the laws of the United States.[45] Implicit in this declaration is the giving of statutory force to what the sponsors of the Thirteenth Amendment and the 1866 Act had spoken of, a federal citizenship which embodied the natural rights seen in Anglo-Saxon law and tradition as the minimum essential rights one must have to be free.[46]

Section 1 of the 1866 Act goes on to declare that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Finally, the section guaranteed to such citizens that they would be "subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." This enumeration of rights calls to mind the summary of the fundamental rights of citizenship of Mr. Justice Washington in *Corfield* v. *Coryell,* 4 Wash. C.C. 371, 6 Fed. Cas. 546 (E.D. Pa. 1823) as including:

> the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pur-

45. Howe, *supra,* fn. 14, at 41. Professor Howe's analysis is most enlightening on this question of the relation between federal citizenship and the state power over slavery.

46. tenBroek, *supra,* fn. 2, at 178, 185 and fn. 14 herein. See also, Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four,* 9 William and Mary Law Rev. (1967) 1 at 4.

> sue and obtain happiness and safety; * * * The right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; * * * to take, hold and dispose of property either real or personal; * * * (at 551-2).

Certainly this charter, spelling out in detail the rights implicit in and necessary to the implementation of the abolition of slavery and involuntary servitude, destroyed forever the iniquitous and racist strictures of *Scott* v. *Sanford*, 19 Howard. 393 (1857), which sought to place the dark skinned human being in a category somewhere between humankind and its animal beasts of burden and supply. The denial of these basic rights in the slave states was by no means the sole source of the specific rights enumerated as now guaranteed by the act. That a chattel could not hold property, levy action in court, make and enforce contracts, be educated, testify as witness and receive the protection of the law for an offense against his person was obvious. And that permitting freed slaves to walk and live free and assert any of these rights endangered the security of the slaveholder's in their chattel was equally obvious. So laws and customs barring these rights to Negroes were to be expected to exist in the South.

But prior to the Civil War the status of free Negroes in the North was little better than that of their slave brethren in the South. They were shut out from white schools and churches, forced to live in city slums and ghettos, denied equal civil and political rights, subject to Jim Crow legislation and degrading "black laws" in many states, confined to menial occupations and almost univer-

sally despised as members of an "inferior" race.[47] And whether these dire results were due to law or custom was not relevant when legislation was being adopted to do away with these disabilities. The existence of laws requiring their imposition made it impossible for even the dissenter, the abolitionist, the good Christian, to act in accordance with his beliefs, and they transferred to the entire community the stain of slavery. But it was the institution, not its source in law or action of private individuals, which contradicted the fundamental concepts of Anglo-Saxon freedom on which our system was based and made slavery "odious."[48]

The language of the Act makes it clear that it is aimed not just at "Black Codes" and other state laws imposing discrimination on the basis of race or previous condition of servitude but rather at any and every effort or development, whether by use of state power or by private power, to re-establish and re-impose on any group the incidents or practices of slavery.[49] The use in the statute of the term "custom" makes it clear that its thrust is by no means limited to the exercise of state power. And the discriminations it bars deal with far more than the right of access to state facilities. Clearly the guarantee against racial discrimination in the right to make contracts can have meaning only in terms of a limitation on the right of private individuals, the other parties to such contracts. And the civil right here in issue, to purchase and hold real

47. McPherson, *supra*, fn. 40 at 223.

48. The Case of James Sommersett, 20 How State Trials 2, 82 (1772).

49. See, Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 Columbia Law Rev. 131, at 138-40 (1950).

property, is equally a right which can have no meaning if private individuals, who are the sellers of most real property, are free, either through conspiracies or individually, to nullify the right by refusing, on the basis of racial bigotry or discrimination, to sell property they have put on the market.

The evil effect of such discrimination, in terms of reinstituting an incident of slavery, or excluding members of the racial group descended from slaves from full participation in the life of the community, of rendering them more subject to economic exploitation and less able to develop their capabilities on a basis equal with members of other racial groups, has been recognized by many states and local communities, which have taken action by law to bar such discrimination.[50]

F. Psychological and Sociological Aspects of Housing Segregation

The conclusion reached by the lawmakers of these states is not without basis in fact. This is evident from the following analysis made by Professors Kenneth B. Clark,

50. See *e.g.*, Alaska Sess. Laws ch. 49, §20-1-3 (1962); Calif. Health & Saf. Code §35700 (Supp. 1965); Colo. Rev. Stat. Ann. §§69-7-1-5 (1963); amended: Colo. Sess. Laws ch. 185 (1965); Conn. Gen. Stat. Rev. §53-35 (Supp. 1963); Ind. Stat. Ann. §40-2308 (1965); Me. Rev. Stat. Ann. ch. 17, §1301 (Supp. 1965); Mass. Laws Ann. ch. 151B, §4 (6, 7) (1965); Mich. Comp. Laws §750.146 (Supp. 1961); Minn. Stat. Ann. §363.03(2) (Supp. 1965); N.H. Rev. Stat. Ann. §354-A:8(IV) (Supp. 1965); N.J. Stat. Ann. §55:14A-39.1 (1964); N.Y. Executive Law §296(5) (Supp. 1965); Ohio Rev. Code Ann. §4112.02(H) (Baldwin, Supp. 1965); Ore. Rev. Stat. §659.033 (Supp. 1965); Pa. Stat. Ann. Tit. 35, §1664 (1964); R.I. Gen. Laws Ann. §§34-17-1 11 (Supp. 1965); Wisc. Stat. Ann. §101.60(2) (Supp. 1966).

In 1967, Hawaii, Iowa, Maryland, Vermont and Washington enacted fair housing statutes.

Isidore Chein and Stephen D. Berger, all outstanding scholars with special expertise in the field of housing discrimination, of the effects of racial segregation in housing which flow from the existing pattern of racial discrimination in the sale or lease of real property by private individuals acting either jointly on the basis of conspiracy or separately on the basis of parallel compliance with existing customs.

"Negroes are by far the most residentially segregated large minority group in recent American history."[51]

The urban Negro and the urban white live in different parts of the city.

Nor have the trends over time been encouraging. Generally speaking, residential segregation increased slightly between 1940 and 1950 and decreased slightly in the following decade. Between 1950 and 1960 residential segregation increased in most southern cities so that most are at least as segregated as northern cities.[52]

"The objective dimensions of the American urban ghettos are overcrowded and deteriorated housing, high infant mortality, crime, and disease. The subjective dimensions are resentment, hostility, despair, apathy, self-depreciation, and its ironic companion, compensatory grandiose behavior."[53]

Further, the poor housing situation of the Negro cannot be explained by his poverty. For this to be the case,

51. Tauber, *Negroes in Cities* (1965. Aldine Press), at 68.

52. *Ibid.*, at 44-5.

53. Clark, *Dark Ghetto* (1965, Harper and Row), at 11.

the quality of housing available at a given price should be the same for Negroes as it is for whites. The only possible conclusion is that "white and nonwhite households are not competing in the same housing market. Instead, white households are competing in a white housing market and nonwhite households are competing in a nonwhite housing market."[54]

The psychological effects of poor housing, *per se* are difficult to separate from the social meaning of housing as an indicator of social status. The most thorough study of the effects of housing, which compared a group of Negroes who moved into a public housing project with a group who remained in the slums found those in the housing project were more likely to feel they were getting their money's worth for the amount of rent, had closer relations to their neighbors, and more pride in their neighborhood. They felt they had improved their position in life and that they were rising in the world.[55]

"Housing is no abstract social and political problem, but an extension of a man's personality. If the Negro has to identify with a rat-infested tenement, his sense of personal inadequacy and inferiority, already aggravated by job discrimination and other forms of humiliation, is reinforced by the physical reality around him. If his home is clean and decent and even in some way beautiful, his sense of self is stronger. A house is a concrete symbol of what the person is worth."[56]

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54. Duncan and Hauser, *Housing a Metropolis—Chicago* (1960, The Free Press), at 204.

55. Wilson, Walkley, Pinkerton and Tayback, *The Housing Environment and Family Life* (1962, Johns Hopkins Press).

56. Clark, *supra*, fn. 53, at 32-33.

Residential segregation of the Negro creates segregated schools. The United States Civil Rights Commission has documented that the growth of urban ghettos and the movement of whites to the suburbs has dramatically increased the number of children attending segregated schools.[57] Studies done for the Commission show that segregated schooling *per se* has a harmful effect on students. Students in segregated schools perform more poorly than students in integrated schools even when the effects of students' backgrounds and of the class composition of the schools are controlled.[58] In addition, communities stigmatize segregated schools as Negro and therefore inferior. This constitutes one more factor in the life of the Negro which reinforces his membership in a lower caste and his feelings of low self-esteem.[59]

Interracial contact is extremely important in bringing about differentiated perceptions of the other race. This is particularly true for the school. As the Commission emphasized:

> Racial isolation in the schools also fosters attitudes and behavior that perpetuate isolation in other important areas of American life. Negro adults who attended racially isolated schools are more likely to have developed attitudes that alienate them from whites. White adults with similarly isolated backgrounds tend to resist desegregation in many areas —housing, jobs, and schools.
>
> At the same time, attendance at racially isolated schools tends to reinforce the very attitudes that as-

57. Report of the United States Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967), 2 vol.

58. *Ibid.*, vol. 1, ch. 3.

59. *Ibid.*, vol. 1, p. 104.

sign inferior status to Negroes. White adults who attended schools in racial isolation are more apt than other whites to regard Negro institutions as inferior and to resist measures designed to overcome discrimination against Negroes. Negro adults who attended such schools are likely to have lower self-esteem and to accept the assignment of inferior status.

Conversely, Negroes who have attended desegregated schools tend to have a higher self-esteem, higher aspirations and are more likely to seek desegregated situations. Whites who have had desegregated education are more likely to report a willingness to accept Negroes in desegregated situations and to support measures that will afford equal opportunity.[60]

The residential segregation of the urban Negro also affects job opportunities for Negroes. Negroes are disproportionately employed near where they live. They are restricted from holding jobs in white neighborhoods, particularly from jobs where they would be seen by clients.[61] Second, since knowledge of available jobs is often obtained only through informal contacts, Negroes are restricted in this way as well from obtaining jobs elsewhere. Third, the time and cost of journeying to jobs outside of the central city are prohibitive for Negroes. Public transportation systems were developed to carry commuters *into* the central business and not *out* from the central city. And most Negroes are too poor to own an automobile. The McCone Commission emphasized the importance of inade-

60. *Ibid.*, vol. 1, p. 110.

61. Kaine, *Housing Segregation, Negro Employment and Metropolitan Decentralization* (to be published in Quarterly Journal of Economics, Feb. 1968). Available, Harvard University Program on Regional and Urban Economics, Discussion Paper No. 14, July, 1967.

quate public transportation for Negro unemployment in Watts.[62]

These three factors become tremendously important when it is realized that since the second world war new jobs have been created largely in the suburbs, far away from the ghettos.[63]

Ghetto residents tend to be shortchanged with regard to such services as schools, garbage removal and police protection.[64] They are also shortchanged by business in the ghetto—"the poor pay more" and all who live in the ghetto, poor or not, tend to buy at the same, largely white-owned stores.[65] Ghetto residents become embittered over such grievances and their occurrence is related to support for violent outbursts.[66]

Thus residential segregation into urban ghettos implies not only residential isolation. On the base of residential segregation is built poor, overcrowded and expensive housing, segregated and inferior schools, unemployment, economic exploitation and inferior services. All of these, harmful as they are in themselves, are much more destruc-

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62. *Ibid.*; also Kaine, *The Big Cities' Big Problem*, Challenge, Sept./Oct. 1966 (reprinted in the reprint series of the Joint Center for Urban Studies, Cambridge, Mass.).

63. Kaine, *The Distribution and Movement of Jobs and Industry*, Harvard University Program on Regional and Urban Economics, Discussion Paper No. 8, Nov. 1966.

64. Clark, *Dark Ghetto* (1965, Harper and Row); Coleman, et al., *Equality of Educational Opportunity* (1966, U. S. Government Printing Office) 2 vol.; Drake, *The Social and Economic Status of the Negro in the United States*, Daedalus, Winter 1965, at 771-814.

65. Caplowitz, *The Poor Pay More* (1963, The Free Press).

66. Murphy and Watson, *The Structure of Discontent*, Institute of Government and Public Affairs, University of California at Los Angeles (1967).

tive because they also reinforce the ghetto resident's realization that this is his lot because he is a Negro.

> Human beings who are forced to live under ghetto conditions and whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth. Since every human being depends upon his cumulative experience with others for clues as to how he should view and value himself, children who are consistently rejected understandably begin to question and doubt whether they, their family, and their group really deserve no more respect from the larger society than they receive. These doubts become the seeds of a pernicious self- and group-hatred, the Negro's complex and debilitating prejudice against himself.[67]

From the perspective of the larger community, the metropolis, it can be argued that "Negro residential segregation is the most important of the fundamental causes of metropolitan disorders."[68]

> The central Negro ghetto has produced a distortion of metropolitan development that has added substantially to problems in central city finance, metropolitan transportation, housing, and urban renewal. The decline of central cities has been hastened by a conviction in the white community, both individual and corporate, that the ghetto would continue its rapid expansion with the associated problems of concentrated poverty and social disorganization.[69]

67. Clark, *supra*, fn. 53, at 63-64.

68. Kaine, *supra*, fn. 62.

69. Kaine and Persky, *Alternatives to the Gilded Ghetto*, Harvard University Program on Regional and Urban Economics. Discussion Paper No. 21, Sept. 1967, at 3.

One reason for the movement of whites to the suburbs, which causes the present transportation crisis, is the presence and expansion of central city ghettos which push "white residential areas farther and farther from central workplaces." "In the absence of encroaching racial ghettos, many central city homeowners might have been encouraged to renovate their existing properties rather than buy new houses in outlying areas." Without central city ghettos there would be more middle- and high-income residential demand in central cities, which would facilitate attempts at center city renewal. Also, suburban firms have been reluctant to move back into the city when faced with the prospect of the ghetto and the "long, hot summer." The flight of upper income whites and of firms to the suburbs, although not due only to expanding central city ghettos, has reduced the financial base for public services while the need for them has risen.[70]

Thus much of the urban crisis today is a product of Negro segregation into central city ghettos and the flight of whites from the Negro and from these ghettos.

The status component in residential segregation has already been discussed above. The corresponding status component in white reactions is also important. Race relations in America are always also status relations. Because residence is one of the most important manifestations of status, the connection between residential segregation and the low status of Negroes (and the corresponding high status of whites) is particularly close.

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70. Kaine, *supra*, fn. 62.

The quality and nature of housing and its neighborhood surroundings, its "address," are important symbols of status in American society. Neighborhoods are evaluated as higher or lower in status.[71] This means that neighborhoods tend to be composed of people approximately equal in status. Thus people in different occupations tend to be residentially segregated from each other according to the status of their occupations.[72] Housing and neighborhood cannot be discussed merely on the basis of their physical characteristics. The social element of status is always intimately involved.

In the competition to achieve high status, belonging to a lower caste is a tremendous constraint, belonging to a higher caste an advantage. As Myrdal had put it:

> When we say that Negroes form a lower caste in America, we mean that they are subject to certain disabilities solely because they are "Negroes" in the rigid American definition and not because they are poor and ill-educated.[73]
>
> The caste principle, as insisted upon and enforced by white society, would undoubtedly be best satisfied by a classless Negro community wherein all Negroes in all respects—educationally, occupationally, and economically—were in the lowest bracket and placed under the lowest class of whites.[74]

71. Warner and Hunt, *The Social Life of a Modern Community* (1944, Yale University Press); Warner, Meeker and Eells, *Social Class in America,* Science Research Associates (1949).

72. Duncan, *Residential Distribution and Occupational Stratification,* 60 American Journal of Sociology (1955), at 493-503.

73. Myrdal, *An American Dilemma* (1944, Harper and Row), at 669.

74. *Ibid.,* at 689.

This is not, and has never been, the case. Negroes are differentiated into classes in somewhat the same way as whites are. In this situation, caste has a slightly different meaning:

> On the same class level—that is, assuming white and Negro individuals with the same education, occupation, income, and so on—the white does *not* "look across" the caste line upon the Negro, but he definitely *looks down* upon him. And this fundamental fact of caste is materialized in a great number of political, judicial, and social disabilities imposed upon Negroes somewhat independent of their class * * *[75]

An important attribute of the American caste system is that equal-status contact with a member of the lower caste tends to be seen as lowering one's own status. It is this fact that makes the American race problem more than a problem of individual prejudice. Caste has its effects regardless of whether a given white is prejudiced or not.

Because housing is intimately connected with status, it is closely related to caste. Residential segregation occurs in part because whites do not wish to live near Negroes for fear of losing status. And residential segregation, which defines a Negro neighborhood as one of low status, helps to reinforce the lower caste status of the Negro.

Residential segregation cannot be explained by the lower economic position of the Negro.[76] Is is not only middle-class whites who fear and flee or fight when Negroes try to move into their neighborhood, nor is it that middle-class

75. *Ibid.*, at 692-693.

76. Tauber, *Negroes in Cities* (1965, Aldine Press), Pascal *The Economics of Housing Segregation,* Rand Corporation (March, 1965).

whites will not oppose the entry of middle-class Negroes into their neighborhood. The most typical situation today is not that of lower class Negroes trying to enter a white neighborhood, but rather: "Expansion of Negro residential areas in recent years has been led by Negroes of high socio-economic status—not only higher than the rest of the Negro population, but often higher than the white residents of the 'invaded' neighborhood."[77]

Residential segregation cannot be explained either by the prejudice of whites. When a neighborhood is "invaded" by Negroes, it is not the case that the racially prejudiced whites lead in leaving the neighborhood. The order of leaving is much more determined by the *status* of the whites, and their possibility of obtaining homes elsewhere.[78]

> Where one lives, both home and neighborhood, is closely linked to social status. When that status is threatened, the individual and the neighborhood take measures to combat this threat, usually by fleeing, but sometimes by violence. The fact that the threat may only be fancied is irrelevant. As long as people believe it to be true, it becomes the truth. In the case of Negroes, the high visibility factor, combined with the

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77. *Ibid.*, at 7.

78. Wolf, *The Invasion-Succession Sequence as a Self-Fulfilling Prophesy*, 13 Journal of Social Issues, No. 4 (1957), at 7-20; Fishman, *Some Social and Psychological Detriments of Intergroup Relations in Changing Neighborhoods: An Introduction to the Bridgeview Study*, 40 Social Forces (October 1961), at 42-51; Leacock, Deutsch and Fishman, *Toward Integration in Suburban Housing*, Anti-Defamation League of B'nai B'rith, n.d.; Lang, Kurt and Lang, *Resistance to School Desegregation: A Case Study of Backlash Among Jews*, 35 Sociological Inquiry (Winter, 1965), at 94-106.

low status of Negroes as a group, has produced an invasion-succession cycle that is separating most large American cities into two ghettos, Negro at core, white on the periphery.[79]

The residential caste segregation of the Negro means that the *sources* of high status in America, education, occupation and income, cannot be transformed into the appropriate American *symbols* or manifestation of high status. It forces the Negro who has "made his way up in the world" to see that he is still defined by others and must still define himself not as a person with a certain achieved status but as a Negro. When the rewards of status are not granted, people are less likely to make the effort necessary to better themselves.

> The middle-class Negro is demanding the right to share in the status symbols of personal success—quality education for his children; white-collar, managerial, or executive jobs; a fine home in one of the better neighborhoods. Having accepted the same value system which the middle-class whites live by, middle-class Negroes are forced to compete with them even at the risk of conflict. The demand for nonsegregated public schools comes largely from upwardly mobile middle-class Negroes; the demands for better white-collar, managerial, and executive jobs and for better nonsegregated housing come from the more successful and stable middle-class Negroes. If whites respond without more grudging tokenism * * * the masses of working-class and lower middle-class Negroes will benefit. *Other Negroes, too, will come to believe that*

79. Mayer, *Race and Private Housing: A Social Problem and a Challenge to Understanding Human Behavior*; 13 Journal of Social Issues, No. 4 (1957), at 3-6.

> *the average Negro can win rewards through persistence, hard work, thrift, and character.*[80]

Indeed, there is some evidence that the successful middle-class Negro cannot even obtain the appropriate status rewards of success inside of the ghetto.[81]

Caste, as a ranking of people without regard to their individual characteristics, is closely related to stereotyping. Studies of interracial contact, especially of interracial housing, all show that such contact tends to reduce stereotypes each race holds of the other, and to increase differentiated evaluations of individuals.[82] Thus, anything which hinders interracial contact helps preserve racial stereotypes.

But it is not interracial contact in itself which reduces stereotyping. Studies show that what is necessary is *equal-status* interracial contact in a non-competitive situation.[83]

> "Racial problems have not been problems of racial contact * * * It is not the sitting next to a Negro at a table or washing at the next basin that is repulsive to a white, *but the fact that this implies equal status.* Historically, the most intimate relationships have been

80. Clark, *supra*, fn. 53, at 60.

81. Tilly, Jackson and Kay, *Race and Residence in Wilmington, Delaware*, Teachers College Bureau of Publications (1965), at 84; Duncan, *Factors in Work-Residence Separation: Wage and Salary Workers, Chicago, 1951*; 21 American Sociological Review (February 1956), at 48-56.

82. Deutsch and Collins, *Interracial Housing* (1951, University of Minnesota Press); Wilner, Walkley and Cook, *Human Relations in Interracial Housing* (1965, University of Minnesota Press).

83. Harding, Kutner, Proshansky and Chein, *Prejudice and Ethnic Relations*, Lindrey, ed., Handbook of Social Psychology (1954, Addison-Wesley), vol. 2, at 1021-1061.

approved between Negro and white so long as status of white superiority versus Negro inferiority has been clear. Trouble comes only when Negroes decided not to be servants or mistresses and seek a status equal to that of whites. When Negroes start to assume symbols of upward mobility, then a pattern of residential segregation develops in the South, too.[84]

Since housing is linked to status, interracial residence is equal-status residence. Thus interracial housing and interracial neighborhoods would help to contradict and begin to destroy the stereotype and the lower caste position of the Negro. Conversely, residential segregation with Negroes restricted to low status areas helps to maintain stereotypes and to maintain the lower caste position of the Negro.

When forced residential segregation is such a powerful reinforcer of caste position it is not surprising that ghetto residents feel powerless, bitter, and alienated from the larger community. A Rochester study compared Negroes in similar economic circumstances in segregated and integrated neighborhoods:

> This single difference was associated with pronounced differences in how Negroes felt about life in Rochester. Those Negroes living on integrated streets were less likely to believe accusations of police brutality against Negroes, were less likely to be sympathetic with the 1964 Rochester riots, were less likely to be antagonistic towards whites, were less likely to feel whites were prejudiced, and were more likely to prefer living in Rochester. In my mind these differences arise because those Negroes who live on mixed streets feel more a part of the community; they feel more accepted by whites. Those who live in all-Negro neigh-

84. Clark, *supra*, fn. 53, at 60.

borhoods do not have the same feeling of belonging to the Rochester community.[85]

It is hardly surprising that collective violence becomes a live possibility for ghetto residents. Nor is it surprising that some have begun to try and make the best of the situation by redefining blackness as a positive virtue and separation from whites as a good thing.

The direct discriminatory effects of the ghetto and the meaning of these effects for relationships between the races and the reinforcement of caste are important. But the effect of the ghetto and its discriminations on the structure of the Negro community inside of the ghetto also is of concern. The Negro community is also a differentiated and stratified one, but the constraint of the ghetto does not provide enough space for the classes to be as spread out, as separated from each other, as in the white world.[86] Because of this, and because so many Negroes are still in poor economic circumstances, "many more Negroes than whites live in predominantly lower-class neighborhoods."[87] Thus most Negro children must go to segregated schools in which the predominant background of the other children is lower class. But the lower class composition of a school has a powerful depressing effect on educational performance.[88] The conclusion is that Negro ghetto children are doubly deprived by being forced

85. Harper, *Integration: Myth and Reality*, Address at the Fifth Regional Conference of the Attorney-General's Committee on Human Relations, Rochester, New York, December 15, 1965, at 6.

86. Tauber, *Negroes in Cities*, *supra*.

87. Report of the United States Commission on Civil Rights, *supra*, fn. 57, vol. 1, at 167.

88. Coleman, et al., *supra*, fn. 64, at vol. 1, ch. 3.

into segregated schools—by the class composition of the school as well as its racial segregation. Parents who try to instill a concern for achievement and for education in their children find their efforts negated by the class composition of the school.

It is well known that such manifestations of social disorganization as juvenile delinquency, drug addiction, crime and mental illness are found with high frequency in the ghetto. The closeness of the ghetto means that all of its residents will be exposed to these phenomena.

> The structure of the Negro neighborhood and the Negro community means that the Negro middle class * * * rarely escapes from the near presence of the Negro poor, as well as of the depraved and the criminal. The middle-class neighborhoods border on the lower-class neighborhoods, and suffer from robberies and attacks, and the psychic assaults of a hundred awful sights.[89]

An important theory of social disorganization argues that deviant behavior is a response to the lack of the means and the opportunity to achieve the means necessary to attain culturally valued goals.[90] Since Negroes are doubly deprived of means and opportunity—by their economic position and their caste—it is not surprising that such phenomena occur so frequently in ghettos.

An environment so full of crime, addiction and mental illness, as well as the discriminatory aspects characteristic

89. Glazer and Moynihan, *Beyond the Melting Pot* (1963, M.I.T. Press).

90. Morton, *Social Structure and Anomie,* Social Theory and Social Structure, Rev. Ed. (1957, The Free Press); Cloward and Ohlin, *Delinquency and Opportunity* (1960, The Free Press).

of the ghetto, works against the efforts of parents to instill appropriate aspirations and concerns in their children. The environment, instead of aiding parents' efforts—and the efforts of the children themselves—tends to thwart it. To escape its effects children have to dissociate themselves as much as possible from their immediate surroundings.

> My colleagues and I found that the most striking characteristic of the "squares"—that is, the non-delinquent, non-drug-using youth—in high delinquency, high drug-use areas of the city is the degree to which they actively dissociate themselves from their destructive environment and work toward leaving it entirely. They are not as yet free to change their place of residence, but they can try to spend as little time as possible on the streets, to select their companions carefully, to concentrate on their school work, to spend their free time in reading and activities of the community center, to seek out suitable adults to serve as models, confidants and advisors, and so on.[91]

There is little wonder then that people wish to escape from such an environment. Added pressure for escape comes from the higher status of white neighborhoods. Middle-class Negroes are especially eager to escape from the ghetto,[92] and become embittered once again when they find that the ghetto has caught up with them again. The result is that all those in the ghetto are dissatisfied with it, and not merely those economically at the bottom. A study of Watts concluded:

> It is important to note that a high level of discontent seems to pervade the entire curfew community.

91. Chein, *Environment and Personality in Behavior Deviation*, Address at the 19th Annual Meeting of the New York Society of Clinical Psychologists, New York, May 20, 1967, at 1-2.

92. Fishman, *supra*, fn. 78, 40 Social Forces at 42-51.

> This is particularly striking in the light of the often repeated refrain that problems of police brutality and exploitation by merchants are essentially confined to the poorer segments of the segregated community. Silberman, for example, argues that "squalid housing, a narrow range of job possibilities, frequent unemployment, low pay, exploitation (whether real or imagined) by landlords, shopkeepers and employers, police brutality—these are the grievances that animate the Negroes that live in the big city slums." We have found that these grievances are indeed salient for the Negroes in Los Angeles and are related to support for the riot and participation in it, but they are not limited to those who form the "underclass" of the Negro community.[93]

The ultimate and increasingly frequent response of ghetto residents to such a totally destructive environment is the riot. There is some reason to think that ghetto residents, feeling that no ordinary action will have any effect on the fact of the ghetto, are increasingly coming to see the riot as an acceptable form of political action.

> Rioting evolves as a form of collective pressure or protest where large numbers of people are crowded and alienated together, sharing a common fate that they no longer accept as necessary, though to them it may seem inevitable.[94]

Increasingly many Negroes are obtaining more education, better jobs, higher incomes, although it is not clear

93. Murphy and Watson, *The Structure of Discontent,* Institute of Government and Public Affairs, University of California at Los Angeles (1967), at 112-114.

94. Lang, *"Racial Disturbances as a Collective Project,"* paper presented at the meeting of the American Sociological Association, San Francisco, August 1967, p. 14.

that the position of Negroes as a group, as compared to whites, is improving.[95] At the same time residential segregation is not declining. and the ghettos are growing. One of the most important American manifestations of status, the home and the neighborhood, is being denied to increasingly many Negroes just as they achieve the characteristics that are supposed to bring high status. The pluralist position which argues that Negroes should be "assimilated" into the larger society while remaining physically separated (by their own choice) fails to see this contradiction. As long as high status is not given to the achievements which merit it in white society, this contradiction increases the destructive effects of the ghetto.

This contradiction between the material improvement of many and their continued status frustration is exceedingly dangerous. It is the classical cause of collective violence.

> It has often been noted by students of revolutionary movements that the period of greatest violence occurs not when people are most deprived and repressed, but rather when things seem to be improving. This has been explained as a consequence of frustrations experienced by persons whose expectations have been raised by material improvements in their life situations and who impatiently come to expect further gains which are not immediately obtainable. In a psychological sense, such persons compare themselves with those enjoying more of the rewards of society rather than with those less fortunate or with their own previous deprivations. Accordingly, modest gains exaggerate feelings of frustration and despair rather than

95. Fein, *An Economic and Social Profile of the Negro American*, Daedalus (Winter, 1965), at 815-846.

diminish them. In the present case, it has been remarked by many public officials that Los Angeles, with its palm-lined streets of single-family dwelling units, its absence of rat-infested alleys, and its relatively better labor market, should not be experiencing violent racial troubles. The above theory would suggest that such improvements in living conditions trigger higher expectations among the inhabitants and a heightened sense of "relative deprivation." * * * The Los Angeles riot * * * appears to have been a collective emotional explosion of persons responding not to ideological pronouncements but to an accumulation of irritation and despair and to the excitment of the moment.[96]

The harmful and destructive effects of forced ghettoization have been outlined above. The results of these effects in reinforcing caste have been shown to be at the base of the present metropolitan problem. The urban problem is a crisis, for discontent, frustration and bitterness are uniform throughout the ghetto. Middle-class ghetto Negroes, as well as lower-class ones, are increasingly willing to resort to violence.

> * * * the motivations of persons supporting that riot vary with their relative positions in the structure of the community. Those who are better off seem to evidence considerable anti-white sentiment which is significantly related to their participation in violence. Those less fortunate rebel against discrimination and appear to be motivated mainly by economic discontent. Mistreatment or exploitation by whites (merchants and police) seems to be a source of riot support for all levels in the ghetto. Such evidence of differential mo-

96. Murphy, *Postscript on the Los Angeles Riots,* Murphy and Elinson, eds., Problems and Prospects of the Negro Movement (1966, Wadsworth), at 231-234.

> tivation points to the hypothesis that the more fortunate members of the community compare themselves with the white majority *and feel frustrated at their inability to gain benefits in keeping with their status aspirations.* Such persons have made social and economic gains, but along with their mobility have gone rising levels of expectation. We have seen that the amount of social contact with whites increases with improvements in socioeconomic status. But we have also seen that discontent increases as social contact increases. We would expect that continued contact with white persons by those Negroes who have made economic gains would serve to increase their impatience and frustration at not being able to enjoy the same freedom of movement and opportunity taken for granted by white persons in their quest of "the American dream." We suspect that many white persons have viewed the middle-class Negro group as a moderating influence in the racial struggle. * * *
>
> We find little room for such an optimistic appraisal. If our analysis is correct, the problems of urban life for the Negro, even in the palm-lined spaciousness of Los Angeles, have grown acute and a significant number of Negroes, successful or unsuccessful, are emotionally prepared for violence as a strategy or solution to end the problems of segregation, exploitation, and subordination.[97] [Emphasis added.]

The foregoing discussion of the effect on the victims of racial segregation in housing, confined thereby to the racial ghetto, is primarily in terms of the effect of such segregation on the self-image of Negro Americans. It demonstrates that today, more than one hundred years after the Thirteenth Amendment and the adoption of the federal law guaranteeing the right of all citizens to purchase and hold

97. Murphy and Watson, *supra,* fn. 66, at 114-115.

real property without discrimination based on race, a pattern of denial to our Negro citizens of that right in our country still remains primarily through widespread racially discriminatory practices by private sellers. The denial of that right which the post-Civil War congresses and federal courts stated to be a badge of servitude, results in its continued existence even now. And such continuance is a violation of the rights protected by the 1866 Act and Section 1982.

Another aspect of the foregoing discussion which has relevance to the issue before this Court in this case is the description of the psychological impact of the segregated racial ghetto on its inhabitants. This Court in *Brown* v. *Board of Education*, 347 U. S. 483, 493-95 (1954) took cognizance of the fact that racial segregation of children in public schools generates in children so segregated "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (at 494). Confinement to a racial ghetto causes not only children, but all those imprisoned in it because of their race to suffer from precisely the disabilities which the 1866 Act sought to end for all the victims of human slavery because its authors knew that without so doing they would fail in their goal of bestowing true freedom on them, of insuring that they could enter the free American society on a basis of equality.

Section 1 of the 1866 Act did, of course, bar many forms of discriminatory state action. Thus the rights to sue and be parties and give evidence can have effect both in instrumentalities of the state and in litigation between private parties. The right to inherit property also is dependent

on the operation of the state's machinery governing decedents' estates. And conveyance and holding of real property normally involves, in addition to private conduct, and the operation of some forms of state machinery such as recordation, the payment of certain taxes and compliance with laws governing the transfers of the kind of property involved. And obviously the guarantee of full and equal benefit of all laws and proceedings for the security of person and property operates primarily as a check on the exercise of state powers. Hence it is clear that Section 1 involves prohibitions on both state and private action in order to achieve its basic goal, elimination for as long as it is law, of all the incidents of slavery and a guarantee to all, free from discrimination based on race, of equality in the exercise of all those civil rights it specifies, because its authors and the Congress that adopted the law believed them fundamental to freedom and necessary to do away forever with the possible revival of human slavery by extirpating every one of its incidents.

Applying the foregoing to the instant case it becomes clear that the District Court is in error when it says, "The legal right to purchase property does not, however, carry with it a corresponding obligation on the part of the owner to enter into a contract of sale against his will." And the Court of Appeals introduces an element of confusion when it questions whether Congress intended to create a duty to sell without discrimination. If the guaranty of the right of the petitioners herein to the same right to purchase real property as white citizens is to have any meaning or impact, it must mean that a would-be seller of real property whose terms as to price and time have been met cannot refuse to sell to the

person who has met those terms solely because of the race of the purchaser. It was not a desire to protect the marketability of property which led Congress to enact the 1866 Act. It was a recognition of the need to end for the freed men all the incidents of slavery. And if this goal is ever to be achieved, the right of Negroes to purchase property, in this instance real property, without discrimination based on race must carry with it a corresponding duty on the part of the seller who has placed his property on the market to sell without discrimination based on race. A seller faced with a would-be buyer who, aside from race, meets all his demands, demonstrates ability and willingness to pay the price asked, and plans a type of occupancy consistent with the seller's wishes, must have an obligation to sell to such a purchaser, if the right of that purchaser to buy free from racial discrimination is to have any reality. Here failure to impose such an obligation on the respondents toward the petitioner, may well result in denial to the Negro petitioner of the right to live anywhere in St. Louis County, even though he can afford a home there and housing facilities are available for sale there. If respondents are not held to be so obligated, they and other sellers similarly allowed to refuse to sell to Negroes, whether by conspiracy, custom or parallel action arising out of fear of social or economic repercussions or bigotry, may exclude Negroes from the entire county, and even, if the practice spreads far enough, the entire area. This would certainly be a denial of the petitioners' right to live and work where they will.

It is not here contended that the Congress that enacted the 1866 Act was intending to adopt a fair housing law.

Rather it intended to insure the right of all to purchase or lease real property without racial discrimination because denial of that right is an incident of slavery. It could not have foreseen the vast development of racial discrimination that has created our racial ghettos and the white surburban nooses around our cities[98] with their concomitants of poverty, slums, economic exploitation of the enforced dweller in the racial ghetto and segregation in education and in employment. But it would have conceded that these results are incidents of slavery which deny the fundamental rights of free men and therefore fall under the ban of the Act. It would have rejected any effort to interpret the Act as not preventing such patterns of racial discrimination in housing when imposed by private persons. It would have insisted that thus leaving the right of the Negro descendants of freedmen to live and work where they wished, dependent on the tender mercy of individual or corporate owners of real property would be to open the way to the perpetuation of an aspect of slavery.

G. Constitutional Authority for the Civil Rights Act of 1866

It is submitted that there are three different grounds in both the Thirteenth and Fourteenth Amendments to support the constitutionality of the Civil Rights Act of 1866. These are Section 2 of the Thirteenth Amendment, the Thirteenth Amendment's first section, and Section 5 of the Fourteenth Amendment.

Section 2 of the Thirteenth Amendment which specifically authorizes Congress to enforce the Thirteenth

98. Report of the United States Commission on Civil Rights, Part 4, *Housing* (1961), at 366-377.

Amendment by appropriate legislation is clear on its face. And the section was relied on as a basis for holding the Civil Rights Act of 1866 constitutional in one of the first cases in which that question arose, *United States* v. *Rhodes, supra.* Circuit Justice Swayne said:

> The second section of the amendment was added out of abundant caution. It authorizes congress to select, from time to time, the means that might be deemed appropriate to the end. * * * (at 793)
>
> Slavery, in fact, still subsisted in thirteen states. Its simple abolition, leaving these laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of the forecast. * * * (at 794)

The Court concluded, at 794, "We entertain no doubt of the constitutionality of the act in all its provisions."

In 1867, U. S. Circuit Judge Chase, in *In re Turner,* 24 Fed. Cas. 337 (1867), granted a writ of habeas corpus to the petitioner, Elizabeth Turner, a young person of color who with her mother had been slaves owned by the

respondent prior to the adoption of the 1864 Maryland constitution which abolished slavery. Almost immediately after petitioner was freed under the state constitution she was bound as an apprentice to respondent and, unlike white apprentices, she was not entitled to be taught reading and writing and arithmetic. To obtain freedom from this indenture she brought her petition of habeas corpus. Circuit Justice Chase found the apprenticeship indenture complained of in violation of the first section of the Civil Rights Act of 1866. He also held the law constitutional saying:

> This law having been enacted under the second clause of the thirteenth amendment, in enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it whether originating in transactions before or since its enactment. (at 339)

In *United States* v. *Morris*, 125 Fed. 322 (1903), defendants were indicted for conspiring to injure, oppress and intimidate certain citizens of African descent in order to prevent them from exercising, on account of their race or color, the right to lease and cultivate lands, a right guaranteed them by Section 1 of the Civil Rights Act of 1866. Defendants demurred to the indictment. The validity of the indictment turned on the constitutionality of Section 1 of the Act. Noting that the statute contemplated acts of individuals, the Court indicated that its validity would have to rest on the Thirteenth Amendment, which unlike the Fourteenth and Fifteenth Amendments, is not limited to state action (at 323-24). The Court ruled (at 330-31):

> In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect

citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment.' In the language of Mr. Justice Field, in his dissenting opinion in the Slaughter House Cases:

"The abolition of slavery and involuntary servitude was intended to make everyone born in this country a free man, and as such to give him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, and to reside in places, where others are permitted to live, would so far deprive him of the rights of a free man, and would place him as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a free man. The compulsion which would force him to labor, even for his own benefit, only in one direction, or in one place, would be almost as oppressive, and nearly as great an invasion of his liberty, as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude." 83 U. S. 90, 21 L.Ed. 413.

District Judge Trieber therefore overruled the demurrer, saying:

> That the rights to lease lands and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable; and a conspiracy by two or more persons to prevent negro citizens from exercising these rights because they are negroes is a conspiracy to deprive them of a privilege secured to them by the constitution and laws of the United States, within the meaning of section 5508, Rev. St. U.S. [U.S. Comp. St. 1901, p. 3712].

In *Harris, supra,* this Court also acknowledged the constitutionality of the Civil Rights Act of 1866 under the Thirteenth Amendment saying (at 640):

> It is clear that this amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure. Mr. Justice Swayne, in U.S. v. Rhodes, 1 Abb. (U.S.) 28; Mr. Justice Bradley in U.S. v. Cruikshank, 1 Woods, 308.
>
> Congress has, by virtue of this amendment, declared, in Sect. 1 of the Act of April 9, 1866, c. 31, that all persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts, to sue and be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other.

But there is authority to support the view that even if the specific authority given to Congress to enact appro-

priate legislation to enforce the Thirteenth Amendment had been omitted, the amendment would have been sufficient to establish the constitutionality of the act here under consideration, Section 1982 of Title 42. Thus in *United States* v. *Rhodes, supra,* Mr. Justice Swayne commented about the Thirteenth Amendment:

> Without any other provision than the first section of the amendment, congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needed for that purpose. (at 793)

And in *United States* v. *Cruikshank,* 25 Fed. Cas. 707, 711 (1874), Mr. Justice Bradley took the same position, saying:

> So, undoubtedly, by the 13th amendment congress has power to legislate for the entire eradication of slavery in the United States. This amendment had an affirmative operation the moment it was adopted. It enfranchised four millions of slaves, if, indeed, they had not previously been enfranchised by the operation of the Civil War. Congress, therefore, acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people. All this it essayed to do by the civil rights bill, passed April 9, 1866 (14 Stat. 27), by which was declared that all persons born in the United States * * * should be citizens of the United States; and that such citizens, of every race and color, * * * should have the same right * * * to inherit, purchase, lease, sell, hold and convey real and personal property, * * * as is enjoyed by white citizens * * *
>
> It was supposed that the eradication of slavery and involuntary servitude of every form and description

> required that the slave should be made a citizen and placed on entire equality before the law with the white citizen, and, therefore, that congress had the power under the amendment, to declare and effectuate these objects.

Another entirely independent authority for the constitutionality of Section 1982 is Section 5 of the Fourteenth Amendment. That amendment was considered and approved at the same Congressional session that earlier enacted the 1866 Act. As approved and ratified it provided in part:

> 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> • • • •
>
> 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The debates on the proppsed amendment were almost entirely confined to the matter of including the guarantee of citizenship in Section 1 and to the questions of representation of the southern states in Congress and disqualification of secessionists from office which were dealt with in what became Sections 2 and 3. There was relatively little discussion of the balance of Section 1 and almost none of Section 5. Nevertheless, there can be little doubt that the principal supporters of the amendment gave it the same

broad interpretation that they were contemporaneously giving the Thirteenth Amendment in the debates on the 1866 Act.

Thus, Senator Howard, leading off the debate in the Senate, said with respect to Section 5:[99]

> Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

He made it clear that he regarded Section 5 as going beyond the operation of Section 1 by saying:

> As I have already remarked, section one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has, under this amendment, is derived, not from that section, but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment.[100]

The fact that the discussion in Congress of the effect of Sections 1 and 5 is limited to brief statements that Congress was to have power to achieve its "great object" only underscores the fact that the section was not limited to legislating against state action.

One aspect of the debate throws further light on the Thirteenth Amendment. The opponents of the 1866 Act, who were also opponents of the proposed amendment, repeatedly pointed out that the amendment duplicated some of the Act's provisions, such as those on citizenship. They

99. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

100. *Ibid.*, at 2768.

suggested that the amendment was designed to shore up the doubtful constitutional basis for the statute. Thus, Rep. William E. Finck of Ohio said of Section 1 of the proposed amendment:[101]

> Well, all I have to say about this section is, that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional.

The amendment's supporters replied that their purpose was quite different; they desired to entrench the statutory provisions in the Constitution where it would take more than a possible future Democratic Party majority to repeal it.[102] Rep. Stevens put it this way:

> Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed * * * This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get.[103]

The proponents thus made it clear that they had no doubt as to the power of Congress to take broad action under the Thirteenth Amendment. This view was expressed in detail by Senator John B. Henderson of Missouri, in a lengthy speech in which he reviewed the history

101. *Ibid.*, at 2461.

102. See, e.g. *Ibid.*, at 2462, 2465.

103. *Ibid.*, at 2459.

of slavery and the events immediately after the Civil War that prompted the Civil Rights Act of 1866 and other statutes adopted earlier in the session, saying that they were:

> * * * a simple act of justice to the negroes and poorer whites of the South, who had always been loyal to the Government * * * Whatever may be said against these measures, and much has been said, their sole object was to break down in the seceded States the system of oppression to which I have alluded.[104]

He went on:

> The President saw fit to veto these measures, supposing them to be unconstitutional. I never doubted the power of Congress to pass them. I never doubted that the Government would be disgraced if it failed to establish for the private citizen the muniments of freedom intended to be secured by them * * *
>
> * * *
>
> * * * The State courts are already deciding the "civil rights bill" to be unconstitutional. The validity of all laws must depend at last upon human judgment. Judges, even in the highest courts, are but mortals. Should the Supreme Court of the United States affirm the judgment of these inferior tribunals, the present period would be no better for the rights of the negro than that when the Supreme Court once before supposed he had no rights which the white man was bound to respect. Should such be the action of this tribunal, the problem would at once be presented, whether four million people can be peacefully held nominally free, but actually slave.[105]

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104. *Ibid.*, at 3034.

105. *Ibid.*, at 3035.

Section 5 of the Fourteenth Amendment is relevant because, as has been noted above, the Civil Rights Act of 1866 was reenacted as Section 18 of the Civil Rights Act of 1870[106] which read:

> *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

It is by virtue of this section that this Court has held that Section 1982 finds its authority in the Fourteenth Amendment as well as the Thirteenth. *Buchanan* v. *Warley,* 245 U. S. 60, 78 (1917). That was plainly the intent of the sponsors of the bill. [107]

The debate on this bill, while it was devoted chiefly to the provisions dealing with the right of freedom to vote, reveals a very broad view of the powers of Congress under the "appropriate legislation" clauses of both the Fourteenth and the Fifteenth Amendments. Thus Rep. Davis, during the debate on the Conference report, said of Section 5 of the Fourteenth Amendment, "No broader language could be adopted than this with which to clothe Congress with power".[108] He went on:

> "Appropriate" means that which is necessary and proper to accomplish the end. Congress, then, is clothed with so much power as is necessary and what is proper.

106. 16 Stat. 144 (1870).

107. Cong. Globe, 40th Cong., 1st Sess. 3871, 3881 (1867).

108. *Ibid.,* at 3882.

A more detailed analysis of both amendments was made by Rep. Pool who insisted that, under both the Fourteenth and Fifteenth Amendments, Congress could reach the conduct of individuals:

> * * * It has been said that voting is a privilege; but this amendment recognizes it as a right in the citizen; and this right is not to "be denied or abridged by the United States, or by any State." What are we to understand by that? Can individuals abridge it with immunity? Is there no power in this Government to prevent individuals or associations of individuals from abridging or contravening that provision of the Constitution? If that be so, legislation is unnecessary. *If our legislation is to apply only to the States, it is perfectly clear that it is totally unnecessary, inasmuch as we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must apply to individuals.* * * * But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot—because the courts would prevent it—by positive legislation, *but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States.*
>
> The word "deny" is used not only in this fifteenth amendment, but I perceive in the fourteenth amendment it is also used. When the fourteenth amendment was passed there was in existence what is known as the civil rights bill, a part of which has been copied in the Senate bill now pending. * * *
>
> * * * And so, under the fourteenth amendment to the Constitution, * * * it is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment

would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article." [109] [Emphasis added.]

In the Senate, the spokesman for the bill, Senator Stewart, opposed the more limited House bill because, "It does not touch outsiders who interfere—mobs."[110] Senator Howard warned against a narrow construction of the "appropriate legislation" clauses in peculiarly prophetic terms." Referring to Section 2 of the Fifteenth Amendment which is virtually identical with Section 5 of the Fourteenth and even closer in language to Section 2 of the Thirteenth Amendment he said:

> It is a prohibition upon the two Governments, the Federal and the State Government, by which they are respectively disabled from passing any act by which this evil shall be created or encouraged. It does not, in terms, relate to the conduct of mere individuals, and a very "strict construction" court of justice might, as I can well conceive, refuse to apply the real principles of the amendment to the case of individuals who themselves, as mere individuals, and not as authorized by Governments or Government officers, shall undertake to deny or prevent to a colored man the exercise of his right of suffrage; and I have some fear, I confess that owing to the peculiar phraseology of this amendment some courts may give it that strict, and, in my judgment, narrow construction.[111]

Another supporter of the bill, Senator Oliver H. P. T. Morton of Indiana, specifically rejected the "state action"

109. *Ibid.*, at 3611.

110. *Ibid.*, at 3656.

111. *Ibid.*, at 3655.

limitation urged by opponents of the bill, saying, with respect to the Fifteenth Amendment (but his words are equally applicable to the Fourteenth):[112]

> I state the position [of the opponents of the bill] as being in conflict with that which we intended by that amendment, to place the colored man upon the same footing, with regard to suffrage, that the white man occupies, and to give to Congress the power necessary to enable him to enjoy it fully; *and that involves the exercise of the power upon individuals.* I repeat again, and it must be fresh in the recollection of most members of the Senate, that the debates upon the adoption of that constitutional amendment will show that it was adopted with that understanding and spirit. I never heard the construction that has been given to it in the argument on this bill, that it operated only upon States as municipal corporations and upon the United States. I never heard that position taken, I believe, throughout the long and interesting debate which took place on the passage of the amendment. I never heard it until today. [Emphasis added.]

In short, Congress was to have broad discretion to judge what legislation was necessary to assure equality and freedom, with power to reach private persons, "outsiders" such as "mobs." It could "go into any of these States for the purpose of protecting and securing liberty," and could "exercise—the power upon individuals" under the provisions of Section 2 of the Thirteenth and Section 5 of the Fourteenth Amendment. The contrary argument, urged by those who had opposed all three amendments from the first (the argument that was later upheld by the courts), that they "operated only upon States as municipal corporations and upon the United States," was rejected by those

112. *Ibid.*, at 3671.

who spoke for the bill as a last ditch effort to render the amendments ineffectual.

The decisions of this Court narrowly construing the post-Civil War civil rights acts on the basis of narrow interpretation of the Thirteenth and Fourteenth Amendments have been widely criticized as incorrect interpretations of the intent, purpose and language of those who adopted them. One of these critics, H. E. Flack,[113] who wrote 43 years after the adoption of Thirteenth Amendment, was a person not unsympathetic to the views which resulted in this narrow reading.[114] Flack examined the legislative history of the Fourteenth Amendment including the debates in Congress and newspaper reports concerning the debates in the ratifying states. He also studied the debates on the civil rights acts of the period. He said of the 1866 Act:

> There also seems to have been a general impression among the press that [N]egroes would, by the provisions of the bill, be admitted, on the same terms and

113. Flack, *The Adoption of the Fourteenth Amendment* (1908). Flack made little attempt in his book to conceal his sympathy with the Democrats and President Johnson as against the Radical Republicans.

Flack's reputation as a scholar does not rest on this work alone. He had received not only BA and MA degrees from Wake Forest College but also a Ph. D. from John Hopkins and subsequently received his LL.B. from the University of Maryland (*Who's Who in America*, Volumes 6 and 10). He was the author or editor of a number of other books including: *Spanish-American Diplomatic Relations Preceding the War of 1898*, Baltimore (John Hopkins Press, 1906) and *Taft Papers on League of Nations*, 1920. He prepared the Annotated Code of the General Laws of Maryland published in 1951 and was also responsible for a number of Codes of Ordinances for Baltimore and various Maryland counties. He was a member of the American Political Science Association, the National Baltimore Municipal League and Phi Beta Kappa.

114. See authorities cited by Mr. Justice Goldberg in his concurring opinion in *Bell* v. *Maryland*, 378 U. S. 226, 286 (1964).

conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc.

He commented that this impression was "clearly warranted, both by the context of the bill and by the declarations of some of its supporters.[115]

Commenting specifically on the fact that Representative Bingham (as well as other supporters of the bill) often gave various forms of official discriminatory action as examples of what the bill would reach, Flack said:

> While these statements might seem to justify the conclusion that Congress was not empowered to act until the States had actually passed discriminating or unconstitutional laws, Mr. Bingham evidently did not intend to leave that impression, for he stated specifically at this time that no State ever had the power, by law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privilege of any citizen though stating that this had been done, and that without remedy * * * This clearly shows that he intended that Congress should have the power to pass laws declaring what rights should be secured to the citizens. Anyway, it matters little whether Congress was to exercise the power before the States had denied those privileges, either by acts of omission or of commission, since Congress was unquestionably empowered to define or declare, by law, what rights and privileges should be secured to all citizens.[116]

Flack concludes his analysis of the Fourteenth Amendment by saying:

> It also seems quite evident that it was intended to confer upon Congress, by the fifth section, the power to

115. Flack, *supra*, fn. 113, at 45.

116. *Ibid.*, 80-81.

determine what were the privileges and immunities of citizens, thereby being able to secure equal privileges and immunities in hotels, theatres, schools, etc. * * *[117]

Flack concluded his book as follows:

However futile were the efforts of Congress to give vitality to the Amendment as interpreted by itself and by those who had most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. [The evidence shows that] according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by the States.[118]

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117. *Ibid.*, at 96-97.

118. *Ibid.*, at 277. Flack's study received authoritative approval at the time of its publication. A book review appearing in the *American Historical Review*, 14:625, April 1909, said:

> He makes it perfectly clear that a number of the strongest and most influential supporters of the amendment repeatedly described its meaning and effect as precisely those which the Supreme Court has steadfastly refused to give to it. Dr. Flack, is, however, too good a lawyer and too exact an historian to say that the Supreme Court was wrong. He is content to leave to the reader the deductions that may be drawn from the clear and scholarly narrative.

The review in the *Annals of the American Academy of Political and Social Sciences*, 33:471, March 1909, said:

> This is an excellent study of the purpose of the 14th Amendment. The conclusion is not new—that the Supreme Court in its later interpretations of the amendment nullified what the almost unanimous belief of national and state legislatures as well as of the people at large as to what change had been made in our constitution. Mr. Flack has presented in detail the historical evidence justifying this conclusion.
>
> The discussion begins with the Freedmen's Bureau and Civil Rights bills, then the amendment itself, prompted by the same

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This Court, close to the time it was striking down the Civil Rights Act of 1875 in the Civil Rights Cases, *supra*, at 32-34, discussing the fifth section of the Fourteenth Amendment, noted that in the Slaughter-House Cases, 16 Wall 36 (1873), the Court, referring to the Fourteenth Amendment, had said that "if the States do not conform the laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation." *United States* v. *Harris*, *supra*, at 638.

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motives as these bills is attacked. From the debates of Congress it is shown that the amendment was in the strictest sense a log-rolling measure, that the motives for the various clauses were largely political and that the section on citizenship—by all odds the most important and the only one which has had a permanent effect upon our government received but little discussion. It seems to have been assumed by Congress that Negroes were already citizens and that the statement in the amendment was declarative only. The real object of the amendment was affirmative guarantee of civil rights. It was to remove all doubts as to the constitutionality of the Civil Rights bill, to make the first eight amendments binding on the states and incidentally to declare who were citizens of the United States.

In his discussion of the amendment before the people and before the state legislatures Mr. Flack shows that the view Congress held was general. The majority thought Congress was to have power to define what were the rights of citizens which the United States could protect and the opposition decried the change as one which would reduce the states to the position of counties.

The last chapter discusses the Congressional interpretations placed upon the amendment just after its adoption. The evidence given as to their purpose by those who framed the amendment bears out the conclusion from the sources previously discussed.

Mr. Flack is to be congratulated on the way he has handled his subject. He has confined himself strictly to the subject in hand and has given us the best compilation of the historical evidence as to the purpose of the 14th amendment which is now available.

See also, the review in the weekly newspaper *Outlook*, 91:774, April 3. 1909.

And in *Strauder* v. *West Virginia*, 100 U. S. 303 (1879), this Court, in striking down a conviction of a colored man for murder because the jury that tried him had, under West Virginia law, been one for which no colored man was eligible, referred to Sections 1977 and 1978 of the Revised Statutes, portions of Section 1 of the Civil Rights Act of 1866, as the basis for Section 641 of the federal statutes which barred denial of the equal civil rights of any citizen in any state court, and said of sections 1977 and 1978, "This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Sect. 641 was an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment." (at 312).

This Court has had occasion recently to give consideration to the authority of Congress to enact legislation against private action under Section 5 of the Fourteenth Amendment. In *United States* v. *Guest, supra,* the Court considered the constitutionality of the charge that the defendants, members of the Ku Klux Klan in Georgia, had conspired in violation of federal law to intimidate Negroes in the exercise of a number of federal rights including the right to equal protection created by the Fourteenth Amendment. The opinion of Mr. Justice Stewart for the Court construed the pleadings as alleging an involvement of state action in the defendants' conspiracy (at 755-57). He was joined in his opinion by Justices Harlan and White. But the remaining six members of the Court, while concurring in the result, indicated acceptance of the view that Congress had power under Section 5 of the Fourteenth Amendment to enact legislation directed against conspira-

cies by private individuals interfering with the exercise of rights protected under the amendment. Mr. Justice Brennan, in his concurring opinion, which was joined in by Mr. Chief Justice Warren and Mr. Justice Douglas, faced the constitutional question, rejecting the view in the Court's opinion that there was state action. The three justices took the position that the indictment was constitutional under Section 5. They said:

> Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, Section 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection (at 782).

The remaining three justices, Clark, Fortas and Black, accepted Mr. Justice Stewart's construction of the indictment as alleging state action but went on to state their belief that "the specific language of Section 5 empowers Congress to adopt laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." (at 762) Since the Civil Rights Act of 1870 was enacted after the Fourteenth Amendment pursuant to the congressional powers of Section 5 thereof and it reenacted the 1866 Act, this doubly established the constitutional power of Congress to enact it.

Hence *Guest, supra,* makes it clear that the statute here involved, the 1866 Act which is the basis of Section 1982,

was twice a valid exercise of the constitutional power of Congress, once under Section 2 of the Thirteenth Amendment and again under Section 5 of the Fourteenth Amendment when it was reenacted in 1870, after the adoption of that amendment.[119]

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119. No contention is advanced herein that the Civil Rights Act of 1866 is and would be constitutional under the privileges and immunities clauses of Article IV, Section 2 of the Constitution and Section 1 of the Fourteenth Amendment, or under the clause guaranteeing a republican form of government to the States of Article IV, Section 4 or the commerce clause of Article I, Section 8, clause 3 coupled with the power to make all laws necessary and proper for executing the specific powers, in clause 18 of the same article. No such contentions are made only because it is believed unnecessary since the more limited and novel arguments made in this brief require the setting aside of no precedents, only the clarification of certain erroneous dicta as in *Hurd* v. *Hodge, supra,* and *Corrigan* v. *Buckley, supra,* at 18 and in *Hodges* v. *United States, supra,* at 18-20. The contentions made herein are ones which have never, either on their facts or on the law, been dealt with by this Court.

But each of the contentions mentioned above has been advanced by scholars of the law with arguments which carry great weight. Professor Chester James Antieau recently advanced an interesting theory to support application of the "privileges and immunities" clause of Article IV, Section 2 and of Section 1 of the Fourteenth Amendment to private discriminatory action in an article cited above entitled *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four* in 9 William and Mary Law Review 1. And an excellent Student Note entitled *Theories of Federalism and Civil Rights* in 75 Yale Law J. 1007 presents a persuasive rationale for federal protection of fundamental civil rights based on the "republican form of government guaranty of Article IV, Section 4 coupled with a reference to the danger to that form of government arising from granting absolute power to a temporary majority faction discussed by James Madison in The Federalist No. 10. And Laurent B. Frantz presents a strong clear rationale for the applicability of Section 1 of the Fourteenth Amendment to private action in the *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts* in 73 Yale Law J. 1351 (1964).

The constitutionality of the Civil Rights Act of 1866 may also rest on the commerce clause of Article I coupled with clause 18.

The commerce clause gives Congress plenary power to protect

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interstate commerce, *Gibbons* v. *Ogden*, 9 Wheat 1 (1824). It is not necessary that when Congress exercises this power, its sole motive be to protect commerce. It may act for moral reasons. *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241 (1964). And its power is not limited to mere regulation of persons or goods crossing state lines. Any activity which affects interstate commerce may be the subject of congressional legislation, even if the persons or goods engaged in the activity are not or may never be in transit. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Katzenbach* v. *McClung*, 379 U. S. 294 (1964).

Therefore, the mere fact that Congress did not explicitly state that the 1866 Act was an exercise of its commerce power should not defeat the statute's constitutionality. An examination of the *actual goals* of the 1866 Act will show that they are similar to those of the Civil Rights Act of 1964. Both acts seek elimination of broad patterns of existing racial discrimination which seriously affect interstate commerce.

In hearings on the proposed 1966 Civil Rights Act, then Attorney General Katzenbach stated that:

> * * * The construction of homes and apartment buildings and the production and sale of building materials and home furnishings take place in or through the channels of interstate commerce. When the total problem is considered, it is readily apparent that interstate commerce is significantly affected by the sale even of single dwellings, multiplied many times in each community.
>
> The housing industry last year represented $27.6 billion of new private investment. This expenditure on residential housing is considerably more than the $22.9 billion which all American agriculture contributed to the gross national product in 1965. Forty-one million tons of lumber and finished woodstock were shipped in the United States in 1963, and 43 percent of it was shipped 500 miles or more. *Hearings on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170; Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. pt. 1*, at 82-83 (1966). [Hereinafter cited as *1966 Hearings*].

It is readily apparent that racial discrimination in the sale of homes reduces the number of new houses built and otherwise impedes the movement of building supplies across state lines. It also discourages the interstate movement of individuals. *1966 Hearings* at 86. In short, it adversely affects interstate commerce.

H. The Reenactment of the Civil Rights Act of 1866 by Section 18 of the Civil Rights Act of 1870

The reenactment of the Act of 1866 by Section 18 of the 1870 Act probably served as the basis for the trial court's statement in the decision in the trial court that Sections 1981 and 1982 "are directed toward governmental action" (A. 17a). The trial court cited *Hurd* v. *Hodge, supra,* and *Buchanan* v. *Warley, supra,* even quoting from the latter case to the effect that the "Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to *qualify* and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." It is clear from the foregoing that the basis of the reading of Section 1982 as being limited to state action is based on its reenactment after the adoption of the Fourteenth Amendment. But such a reading ignores the expressed intent of the Congress which adopted the 1866 Act over President Johnson's veto and followed it up by approving the Fourteenth Amendment and submitting it to the states for ratification. The fact is that an examination of the legislative history of the Fourteenth Amendment makes it clear that the authors and the two-thirds majority in Congress that passed that amendment did so to place the 1866 Act beyond the possibility of repeal by any later Congress.[120] They saw the amendment as an emphatic reassertion of the civil rights secured by the 1866 Act, not as a limitation on that Act preventing federal protection of those rights against private individuals. The Congress which approved the amendment did so

120. See, Gressman, *supra,* fn. 10, at 1328-30.

to remove all doubt about the constitutionality of the 1866 Act, doubt which they did not share. As Rep. Thomas D. Eliot said:

> I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.[121]

Professor Mark De Wolfe Howe, discussing this question, reached the following conclusion:

> I have not seen any evidence that when the Fourteenth Amendment was adopted its framers intended to take back any of the congressional authority which the Thirteenth Amendment had created—the authority that is, to deal with private efforts to perpetuate the inequities born of slavery. Nor is there, in my judgment, persuasive evidence to suggest that the congressional power specifically granted in the Fourteenth Amendment to enforce its prohibitions of State action was intended merely to authorize legislative condemnations of practices that the amendment's own prohibitions outlawed. I see very little reason, in other words, to believe that the Fourteenth Amendment denied Congress the power to condemn private action designed either to impair the privileges of the colored citizens of the United States or to prevent the States from safeguarding the liberty and equality of Negroes.[122]

Professor Howe, discussing the views of the authors and supporters of the Fourteenth Amendment went on to say:

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121. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

122. See, Howe, *supra*, fn. 14 at 50-51.

> We know that its draftsmen were predominantly, if not wholly concerned with assuring the total fulfillment of the promises of the Thirteenth Amendment and of the equality act of 1866.[123]

It would be ironic if the effort of the Congresses which adopted the Fourteenth Amendment and the Civil Rights Act of 1870 to give greater strength and emphasis to what Professor Howe so aptly calls the "equality act of 1866" were now read and held to limit that act to state action and thereby to prevent the federal government from dealing with the most serious remaining inequality arising from our history of accepting and permitting Negro slavery, racial segregation and exclusion in housing.

The reading of the 1870 reenactment of the 1866 Act as limiting its object to state action also ignores a fundamental canon of statutory interpretation that the reenactment of a statute effects no change in the law but merely continues the original law in force.[124]

I. The Relationship of Section 1983 to Section 1982

The trial court took the position that Section 1983 of Title 42 of the United States Code "alone of the civil rights statutes, other than the Civil Rights Act of 1964, provides for a right of action" (A. 18a). The trial court went on to find that Section 1983 may be resorted to only where there is state action and concluded that since it found no state action, petitioners were without remedy against the discriminatory denial of their right to purchase the real property in question.

123. *Ibid.*, at 52-3.

124. 50 Am. Jur., *Statutes*, Sec. 441.

It is respectfully submitted that there is no authority to sustain the contention that the sole remedy for violation of Section 1982 is that contained in Section 1983. If, as has been demonstrated above, Section 1982 was based on the Thirteenth Amendment and protected the right to purchase or lease real property without discrimination based on race, a vestige of slavery, against all persons, private as well as those acting under the authority of the state, such a limitation of remedy would make Section 1982 practically meaningless. And such a result would be to assume that Congress elected to enact a nullity in violation of a basic canon of statutory construction.

From the very beginnings of Anglo-American jurisprudence it has been a maxim of canon law that "Remedies for rights are ever favorably extended."[125] Courts of equity have always taken as a basic principle that wrongs must be remedied:

> The maxim that equity will not suffer a wrong to be without remedy, is probably the most important of the principles which are addressed to the court or chancellor.[126]

In *Colorado Anti-Discrimination Commission* v. *Case*, 380 P. 2d 34 (Colo. 1962), the Supreme Court of Colorado, upholding the constitutionality of the Colorado Fair Housing Law, gave support to the foregoing doctrine saying:

> The constitution of the state and the nation recognize unenumerated rights of natural endowment. These God-given rights should be protected from infringe-

125. 18 VINER'S ABRIDGEMENT 521; COKE ON LITTLETON, 153 a, b.

126. 19 Am. Jur., *Equity*, Sec. 451.

ment or diminution by any person as well as any department of government. It is the solemn responsibility of the judiciary to "fashion a remedy" for the violation of a right which is truly "inalienable" in the event that no remedy has been provided by a legislative enactment at 40.

It is submitted that the foregoing doctrine must be followed by the federal courts if Section 1982 is to be prevented from being rendered a nullity.

It is also noteworthy that Section 3 of the Civil Rights Act of 1866 specifically refers to civil suits "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section" of the act and grants to the district courts of the United States cognizance of all such causes. Hence the authors of the Act specifically authorized and contemplated enforcement of those rights, including those protected by Section 1982, by means of civil suit. And even though this provision was later omitted from subsequent codifications of the federal laws, such omission cannot serve to extinguish the right to enforcement of those rights by civil suit. *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953).

Section 1983 is derived from the Civil Rights Act of 1871 which was subtitled "An Act to enforce the Provision of the Fourteenth Amendment to the Constitution of the United States and for other Purposes." And the original act specifically provided that proceedings instituted under it were to be prosecuted in the district or circuit courts of the United States "with and subject to the same rights of

appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six * * *" Section 7 of the 1871 Act specifically provided that "nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; * * *" This provision, it is submitted, completely negates any inference that the remedies in Section 1983 are limitations on the rights established in Section 1982 and on the propriety of bringing suit in the United States District Courts for violation of those rights.

POINT II

Assuming, *arguendo*, that Section 1982 is applicable only where there is state action, the discrimination suffered by petitioners results from state action and they are therefore entitled to relief under the equal protection clause of the Fourteenth Amendment as they would be under the statute.

It is well established that some form of state action which results in a denial of equal protection is required for invocation of the first section of the Fourteenth Amendment. Civil Rights Cases, *supra*; *Hodges* v. *United States*, *supra*. However, it is equally well established that the concept of state action has not been reduced to an exact formulation with clearly defined limits. It remains imprecise and capable of application to an extensive variety of situations. E.g., *McCabe* v. *Atchison T. & S.F. Ry.*, 235 U. S. 151 (1914) (State authorization to discriminate is no less state action than state imposed discrimination); *Buchanan* v. *Warley*, *supra* (Discriminatory zoning ordinances are in-

valid); *Smith* v. *Allwright,* 321 U. S. 649 (1944) and *Terry* v. *Adams,* 345 U. S. 461 (1953) (White primaries held to be functionally equivalent to black disenfranchisement); *Marsh* v. *Alabama,* 326 U. S. 501 (1946) (Company-owned town is subject to same constitutional prohibitions as municipal town); *Shelley* v. *Kraemer,* 334 U. S. 1 (1947) (State participation found in judicial enforcement of racial restrictions determined by private parties in agreements); *Cooper* v. *Aaron,* 358 U. S. 1 (1958) (Members of school board and superintendent of schools are agents of the state); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961) (State lessee may not exclude Negroes from his restaurant); *Anderson* v. *Martin,* 375 U. S. 399 (1964) (Racial labelling of candidates on ballots invalidated because it encouraged and assisted discrimination); *Griffin* v. *Maryland,* 378 U. S. 130 (1964) (Combination of state and private powers bring constitutional guarantees into operation); *Evans* v. *Newton,* 382 U. S. 296 (1966) (Provision of park services is municipal in nature); *Reitman* v. *Mulkey,* 387 U.S. 369 (1967) (The right to discriminate without interference of any governmental organ of the state may not be embodied in the state constitution).

The need for a flexible principle of determining what is state action is demonstrated by these and other such cases involving the requirements of the Fourteenth Amendment. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority, supra* at 722.

The facts and circumstances of the instant case demonstrate numerous ways in which the State is involved in

the development of the Paddock Woods subdivision. Respondents are themselves licensed and incorporated by the State of Missouri and utilize the services of other state licensees, and of state and municipal offices (including the Building Commissioner, Planning Commission, Recorder of Deeds, Sewer District, County Engineer and the Highway Department). They have also been delegated the right and power to control and regulate the community during and after its construction by means of covenants and quasi-taxing power, to assess and impose liens against residents for community-wide services (A. 7a-9a).

In brief, the respondents are engaged in the construction and governing of a self-contained residential community. They are carrying out state functions similar in nature to the varied powers of a municipality. In *Buchanan* v. *Warley, supra,* this Court held that racially discriminatory zoning ordinances were invalid under the Fourteenth Amendment. Thus government enforced segregation in housing was ruled unconstitutional. And of course an attempt to achieve the same result indirectly suffers from the same constitutional infirmity. See *Burton, supra,* at 725. The state can not permit another to perform one of its vital functions in a discriminatory manner.

Marsh v. *Alabama, supra,* is one of the cases in which the Court responded in terms of reality to the principle of state action and is analogous to the instant case. In *Marsh* the state attempted to impose criminal punishment on a person who distributed religious literature on the premises of a company town against the wishes of the town's management. Mr. Justice Black stated for the ma-

jority that the corporation's property interests do not settle the question (at 505). He noted, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." By way of illustration he pointed out that if facilities are built and operated primarily for public benefit and their operation is essentially a public function, they are subject to the limitations to which the state is subject and cannot be operated in a discriminatory manner (at 506).

Similarly, in the case at bar the respondents whose project is freighted with many aspects of delegation to it of state authority may not discriminate against prospective Negro purchasers in offering the homes of the subdivision for sale to the general public. The historic decision of *Brown* v. *Board of Education, supra,* is now generally accepted as establishing the constitutional right of Negroes to be free from discrimination in the life of the community. See, *e.g., Watson* v. *City of Memphis,* 373 U. S. 526 (1963). This personal right ensures that every Negro is an equal member of the general public. And where, as here, homes are built to be sold to members of the public and the essentially public function of operating a community is undertaken by private individuals, the Fourteenth Amendment requires that, in carrying out this public function, those private individuals shall not discriminate against Negroes, who must be given the same right to purchase real property as is given to other members of the general public.

In *Marsh, supra,* the majority also stated that "whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." (at 507). Just as the managers of a company town can not curtail First Amendment rights of those entering the town because they are bound by the Fourteenth Amendment, the respondents can not curtail Fourteenth Amendment rights of members of the public who have an interest in the functioning of the community in a manner consistent with the equal protection of the law.

Marsh, supra, cannot be distinguished from this case on the basis of the fact that the former involved the attempted application of a criminal statute. The majority opinon, in addition to holding that a criminal penalty could not be imposed, also stated that the mere circumstance of private ownership is not sufficient to permit the community to be *governed* in a manner which restricts constitutionally protected liberties (at 509). In *Marsh, supra,* this Court was impressed with the fact that the town had all of the outward characteristics of any other American town (at 502). In this case the Court is dealing with a suburban community that is similar to any other suburban political subdivision. And state action is further demonstrated by the fact that the creation of public school segregation and the control of political representation from the area depends on the residential pattern established in the community by respondents. If Negroes are systematically excluded from suburban housing developments, a necessary consequence is their exclusion from areas of in-

creasing political representation and the systematic exclusion of their children from suburban school districts.

The specific factors on which most of the cases that found there was state action can be distinguished are relatively unimportant. In this area this Court must deal in each case with new situations for which there is no settled precedent or doctrine.[127]

However, one common thread that runs through these cases is a recognition that private individuals can by enfranchisement or regulation by the state take on the carrying out of a state function and thereby become subject to constitutional limitations imposed on the state. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952).[128] The instant case illustrates such an enfranchisement and regulation. Viewing the totality of respondents' scheme for building their community, the only conclusion that can be drawn is that here there is "action" by the state.

The state imposes strict requirements on the issuance of real estate licenses and regulates the operation of that profession in many aspects. The licensing and regulation of real estate brokers and plumbers and contractors of various sorts are required to protect the public welfare, to guard the public against shoddy business practices and defective workmanship, and to prevent results dangerous to the entire community endangering the public health and well being. In certain instances the state will not permit

127. See, *Burton*, *supra*. See also, Black, *Foreword*: *"State Action", Equal Protection, and California's Proposition 14*, 81 Harv. Law Rev. 69, 87-89 (1967).

128. See also, Williams, *The Twilight of State Action*, Tex. Law Rev. 347, 350 (1963).

individuals to be licensed because of either moral or professional shortcomings. Having undertaken to protect the public welfare in this manner, the state has made such licensing an aspect of its operation. Licensees act with the approval and sanction of the state. If a person who has been licensed by the state discriminates against a member of the general public because of race, the exercise of these powers flowing from the license is a form of state action under the Fourteenth Amendment. The action of the state in granting the license is a necessary condition for the carrying out of this particular act of discrimination. To insure equal protection of the laws a state must ensure that its licensees do not discriminate. See, *Garner* v. *Louisiana,* 368 U. S. 157, 176 (1961), Douglas concurring; *Lombard* v. *Louisiana,* 373 U. S. 267, 277, 283 (1963), Douglas concurring.

In *Burton* v. *Wilmington Parking Authority, supra,* this Court held that a restaurant operated by a private owner under lease in a public building was engaging in discriminatory state action in violation of the equal protection clause when it refused to serve Negroes. The majority looked to the sum of the surrounding circumstances, and found that the private business there had become sufficiently involved with the public interest and with the activities of the state, to make its activity subject to Fourteenth Amendment limitations.

The land and building were publicly owned and maintained and dedicated to public use. The structure had been erected with public funds and for the public convenience (at 723-24). "By its inaction, the Authority, and through

it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (at 725).

The instant case is similar to *Burton* in that the State of Missouri has so far placed itself in a position of interdependence with respondents that it must be considered a joint participant in the discriminatory activity. In this regard certain language from the separate opinion of Mr. Justice Douglas in *Reitman* v. *Mulkey, supra,* at 384-5, is highly instructive:

> Zoning is a state and municipal function. See Euclid v. Ambler Realty Co., 272 U.S. 365, 389 et seq., * * *; Berman v. Parker, 348 U.S. 26, 34-35. * * * When the State leaves that function to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act. The present case is therefore kin to Terry v. Adams, 345 U.S. 461, * * * where a State allowed a private group (known as the Jaybird Association, which was the dominant political group in county elections) to perform an electoral function in derogation of the rights of Negroes under the Fifteenth Amendment.
>
> Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which Shelley v. Kraemer, supra, can be construed.

The state here has acquiesced in the discriminatory operation by Affred H. Mayer Co. of its zoning and other governmental functions. And if a state must ensure that its lessees in a public facility operate in a manner consistent with

the Fourteenth Amendment, there is no reason to excuse it from the same duty with respect to its licensees who are not only regulated but are delegated the right to exercise governmental functions in the public interest. The *Burton* decision is of added significance in this area because it implicitly overrules whatever inferences to the contrary may flow from the case of *Dorsey* v. *Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541, (1949) cert. den. 339 U.S. 981 (1950).[129]

When a state permits a private party to carry out a function which is essentially that of the state or a political subdivision, then the carrying out of that function is subject to all of the requirements of the Fourteenth Amendment. This is true whether or not the state retains any power to direct the carrying out of that activity and whether or not the state has any property nexus of any kind with the "private" party.

> It would scarcely be argued that a city could establish water works, sewerage systems, flood walls, roads and other public works * * * and then lease them to private operators, who would then be allowed to discriminate * * * *Lawrence* v. *Hancock*, 76 F. Supp. 1004, 1009 (S. D. W. Va. 1948).

If we assume, as we must, that it is not the lease that counts, but the function carried out by the lessee, then this decision applies even if the facilities are owned outright by a "private" person. In fact, it is not possible to imagine a situation, at this stage of development of the law of racial discrimination, where "water works, sewerage systems, flood walls, roads and other public works" could be consti-

129. See, Black, *supra*, fn. 127, at 85.

tutionally operated in a racially discriminatory manner regardless of who technically owned the facilities. If one is not allowed, "private" party or not, to run a water works in a racially discriminatory manner, then certainly one will not be allowed, "owner" or not, to run an entire community in a manner violative of the Fourteenth Amendment.

Petitioners have alleged facts in their complaint sufficient to demonstrate that the respondents' development for purposes of the Fourteenth Amendment is in fact a town (A. 7a-12a). The respondents supply numerous services which would otherwise have to be supplied by local government. The respondents' development is located in the unincorporated portion of St. Louis County. This portion of the county is covered by a comprehensive Land-Use Plan, "Guide for Growth," which has been adopted by the St. Louis County Planning Commission, and the respondents' development was located according to the principles governing the growth of the county which appear in that plan. Furthermore, respondents' development was approved by the Planning Commission and by the County Council (A. 8a). In order for a development to be approved it is considered as an entity, and is approved only if its plans have the approval of the Planning Commission and the County Council.

As part of the approval process legal obligations are created which reinforce the conclusion that the privately owned development is a "town". The common recreational area is conveyed to trustees, appointed in the first instance by respondents, who "represent" the development

and who hold and administer it for all residents in the development. Trustees are also empowered to provide garbage collections and other community services. A "municipal" golf course, open exclusively to residents and their guests is provided. Finally, the developer must impose covenants on the use of land within the development which, under the law of Missouri, supersede and take the place of the regulations of the zoning ordinance which would ordinarily control the use of property within this area.

In other words, not only were the creation and maintenance of sanitary, recreational and other community facilities a function and responsibility of government, delegated to respondents, but the very responsibility for zoning and community planning of the tract was affirmatively delegated by the government to them. This was exactly, in the words of the Fourth Circuit,

> * * * fulfillment by a private body of a "state" function pursuant to an extensive state plan. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959, 969 (4th Cir. 1963), cert. denied, 376 U. S. 938 (1964).

And it is a state function which the state certainly could not carry out in a discriminatory manner. *Buchanan* v. *Warley, supra.* It is not reasonable to allow the state's delegate to discriminate on the basis of race, insulated from the Fourteenth Amendment, to do what the state, itself, could not.

It should be noted that with respect to many of these functions, the state has the power but not the duty to act. But on the basis of this analysis, the key question is not what is the duty of the state, but what the state does. Certainly no state has a duty to conduct a primary election. And yet when primary elections or pre-primaries are held,

even by private organizations, they are subject to the Fourteenth Amendment. See *e.g., Terry* v. *Adams, supra.*

In like manner, it is impossible to argue that a state has a duty to furnish hospital care, or swimming pools, or golf courses, or parks or any of the myriad activities which have been held "state action" despite private operation and ownership. But since these activities were government activities in the locality where they occurred, the state was not permitted to allow them to be carried on in a discriminatory manner, even when the state turned them over to private hands.

Thus, in the instant case, the state had no duty to turn every community into a municipal corporation, but when it allowed respondents to create a "town" and to carry out governmental functions in so doing, the carrying out of those functions is subject to the Fourteenth Amendment and must be carried out in a non-discriminatory manner.

If the respondents' community were an incorporated village, and there were a village ordinance forbidding sale of real property to Negroes, that ordinance would be invalid. *Buchanan* v. *Warley, supra.* If the area of the respondents' community were not politically incorporated, but all of the individuals who owned land in it agreed with each other that no one should sell his land to a Negro, that agreement could receive no sanction or enforcement by the state under the Fourteenth Amendment. *Shelley* v. *Kraemer, supra.* If the respondents' community were closed to persons coming into its streets attempting to exercise their right of free speech this would be improper under the First and Fourteenth Amendments. *Marsh* v. *Alabama, supra.*

It is respondents' position nonetheless, that what cannot be done by statute, and cannot be done by covenant, and cannot be done with respect to freedom of speech by even an absolute owner of a community, can be done by the absolute owner of a community in disregard of the equal protection clause of the Constitution. Such a contention cannot stand.

In summary, it is the position of the *amici* that, in addition to all the services which the various agencies of the State perform for respondents, the State is involved with them in a fundamental way; that is, they are actually carrying out governmental functions of the State which makes their action "state action" subject to the Fourteenth Amendment. The business of the respondents is not only "affected with the public interest," but for the residents and prospective residents of Paddock Woods, their business is equivalent to their local government. It is entirely inconsistent with the letter and spirit of the Fourteenth Amendment for a State to permit its citizens to be segregated on the basis of race in living areas by the mere expedient of turning its authority and responsibilities over to private persons. To hold that the Fourteenth Amendment does not apply to a situation such as is here under consideration is to hold that the State can avoid its responsibilities to all its citizens by subjecting them to the control and authority of a private individual or corporation as their municipal overlord rather than the control and authority of a regular publicly elected and controlled municipal government. The fact that in practice the State has done exactly this, confining its Negro citizens to the regularly established city and town governments while

allowing private developers to create and maintain segregated residential towns in the suburbs from which persons are excluded solely on the basis of race, does not make the practice either lawful or constitutional. It is in fact a clear evasion of the law of the land as embodied in the Fourteenth Amendment. It is submitted that this Court should not permit the practice of segregation in communities to be continued any longer through the fiction that it is the result of "voluntary" private action when in reality it is municipal action possible only with the direct permission and assistance of the State government and its agencies.

Conclusion

The decision of the court below dismissing the complaint should be reversed.

Respectfully submitted,

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The Constitution

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Civil Rights Act of 1866

Act of April 9, 1866. 14 Stat. 27.

—An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

SEC. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person hav-

ing at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," ap-

proved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States; so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

SEC. 4. *And be it further enacted,* That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial

court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

SEC. 5. *And be it further enacted,* That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the

United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

SEC. 6. *And be it further enacted,* That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or

conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

SEC. 7. *And be it further enacted,* That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioner for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be re-

quired in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

SEC. 8. *And be it further enacted,* That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

SEC. 9. *And be it further enacted,* That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

SEC. 10. *And be it further enacted,* That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

Civil Rights Act of 1870

* * *

SEC. 18. *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

* * *

Civil Rights Act of 1871

Act of April 20, 1871. 17 Stat. 13.

—An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary nowithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several dis-

trict or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

* * *

SEC. 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offences heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

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42 U.S.C. Section 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

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42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES,
Petitioners,

vs.

ALFRED H. MAYER COMPANY, A CORP., ALFRED REALTY COMPANY, A CORP., PADDOCK COUNTRY CLUB, INC., A CORP., AND ALFRED H. MAYER,
Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT.

BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AND MINNESOTA FEDERATION OF TEACHERS, AFL-CIO, AMICI CURIAE.

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INTEREST OF AMICI.

This brief is filed on behalf of the American Federation of Teachers, a federation of teachers' unions with a membership of more than 150,000, and the Minnesota Federation of Teachers, one of its state affiliates. The American Federation of Teachers is affiliated with the American Federation of Labor, Congress of Industrial Organizations (AFL-CIO).

The American Federation of Teachers is vitally inter-

ested in the outcome of this case, for *de facto* segregation in housing bears a direct relationship to *de facto* segregation in educational facilities. The Negro child, who is forced to live in the Negro ghetto in any city because his parents are prevented solely on the basis of their race from procuring housing in "white" neighborhoods, is forced to attend what are, in fact, segregated public schools. That the segregation of children in public schools solely on the basis of race deprives such children, *both* Negro and white, of equal educational opportunities is well settled. The members of the American Federation of Teachers then are interested here not only because of a commitment to the eradication of racial injustice, but more directly because of a commitment to the improvement of public education in the United States. The decision reached in this case will directly affect that vital interest and, concomitantly, the well-being of our members.

The American Federation of Teachers and the Minnesota Federation of Teachers hope that the filing of this brief will aid the Court in reaching its decision in this case. Letters of consent are filed herewith.

ARGUMENT.

I. INTRODUCTORY STATEMENT.

Plaintiff-petitioner adequately states the facts and nature of this case. The issue was phrased by the District Court, as follows:

> "[T]he issue is whether the willful refusal of an owner of private property who is developing a private subdivision thereon to sell a part of his property to a Negro solely because of race entitles the person so discriminated against, under any presently applicable federal law, either to damages or to a mandatory injunction or both." *Jones* v. *Alfred H. Mayer Co.*, 255 F. Supp. 115 (E. D. Mo., 1966).

It should be noted that, as Judge Blackmun stated below,

> "This case comes *close* to raising nakedly the question whether, in the absence of federal and state open housing legislation, an owner of a home, which is on the market for sale, may refuse to sell that home to a willing purchaser merely because that purchaser is a Negro." *Jones* v. *Alfred H. Mayer Co.*, 379 F. 2d 33, 34 (8th Cir., 1967) (Emphasis supplied).

Appellees will undoubtedly argue that this *is* the issue before the Court and that the decision herein will directly and significantly affect the disposition of *all* privately-held real property. If this were the issue, the position of the American Federation of Teachers would still compel it to appear in support of the appellants. However, such is *not* the case. The issue, confined by the facts herein, is whether 42 United States Code § 1982 prohibits discrimination in private subdivision housing.

> "Whatever the ultimate results of the cases that will be presented to the Court under the fourteenth amend-

ment, they should flow from consideration of the problems presented, not from a formula that ignores them." Lewis, "The Meaning of State Action," 69 *Colum. L. Rev.* 1083 (1960) at 1121.

We, therefore, ask the Court to consider the presentation of the issues herein as viewed by the American Federation of Teachers.

The decision of the Eighth Circuit Court of Appeals approached the issue on three different bases: the Thirteenth Amendment; the Fourteenth Amendment; and relating a private subdivision to a governmental function. We shall discuss all three in this brief.

II. THE COURT OF APPEALS WAS UNNECESSARILY RESTRICTIVE IN ITS INTERPRETATION OF THE THIRTEENTH AMENDMENT.

The Eighth Circuit considered the application of the Thirteenth Amendment to this case and decided that the "wrong" suffered by plaintiffs was not a "badge of slavery." Therefore, the Thirteenth Amendment did not provide a solution; nor did 42 U. S. C. 1982 if that law were based upon the Thirteenth Amendment.

Admittedly the law holding that the Thirteenth Amendment and any implementing legislation can apply to individual's acts of discrimination is sparse. *United States* v. *Morris*, 125 Fed. 322 (E. D. Ark., 1903). Yet we contend that a historical analysis of the Thirteenth, Fourteenth and Fifteenth Amendments and the civil rights legislation of the Reconstruction era reveals that the overall aim of these enactments was destruction of the social structure as it existed prior to the Civil War. The Negro was to be treated no differently than the white. One of the rights now given to the Negro was the right to property with all its attributes—ability to buy, sell, lease, etc.

The Circuit Court of Appeals recognized this right but held that this right was very different from a right to specific property. The distinction is well-taken, but a right is nothing but a word until it is actually enjoyed. The right to property can be realized only in specific property. If that is categorically denied to Negroes, they can hardly be said to have the right to property. Their denial is directly attributable to their color; their color is tied up in the caste system present before the Civil War. Continuing an attribute of that system continues the system itself.

We note that the Thirteenth Amendment gives Congress the power to implement the removal of slavery. Such legislation, we contend, can go far beyond the mere prohibition of slavery. It can aim at the removal of attributes of slavery—one of which was the inability to own property. This legislation can prohibit acts of individuals, for the Thirteenth Amendment acts directly against individuals. 42 U. S. C. 1982, we contend, can find its validity in the Thirteenth Amendment. Plaintiffs can find relief against defendants under the legislation.

III. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE "STATE ACTION" FOR ITS APPLICATION.

When considering the application of the Fourteenth Amendment to the instant case, two questions immediately arise: 1) Is state action an essential requirement for the application of the Fourteenth Amendment? 2) If so, was there state action in the instant case?

Ever since 1883, the *Civil Rights Cases*, 109 U. S. 3, courts considering application of the Fourteenth Amendment have demanded that state action be present. However, opinion in recent cases indicate that section 5 of the Fourteenth Amendment may authorize the federal government to act against individuals who deny to others the

rights covered by the Fourteenth Amendment. Mr. Justice Brennan expressed this opinion in *United States* v. *Guest*, 383 U. S. 745 (1966) (concurring opinion), when he said the Fourteenth Amendment reached private conspiracies to interfere with equal utilization of state facilities.

This view is analogous to the application of the Fifteenth Amendment in voting cases. In *Terry* v. *Adams*, 345 U. S. 461 (1963), the Jaybird Association was a private organization. Yet its choice of candidates was decisive as to who appeared on the ballot. The Court applied the Fifteenth Amendment to the situation and found the exclusion of Negroes from the association and its voting procedures to be unconstitutional. This decision followed *Smith* v. *Allwright*, 321 U. S. 649 (1944), which imposed a duty upon the state to see that its voting procedures were not discriminatory. In a sense, state inaction qualifies as state action for certain purposes of the Fifteenth Amendment.

Summarizing this line of thought, it might be said that when an individual or group of individuals acts to prevent another from access to the exercise of rights protected by the Fourteenth Amendment, action can be brought against such individuals.

It is relatively easy to apply this theory to the facts of the present case. For example, the complaint states that those children living in defendants' development will have access to public schools. Considering the fantastic growth of such suburban developments and of modern high-rise city apartments, exclusion of Negroes from such large-scale housing will force Negroes to find housing in the traditional Negro ghettoes of our large cities. The opportunity for equal education simply does not exist if the "neighborhood school" is the policy followed by the school district. The inner city or ghetto schools do not provide

an equal opportunity for an adequate education compared to suburban schools where the expenditure per student is usually much higher than that per student in inner city. Yet most state constitutions impose upon the state legislatures the duty to provide a good education for *all*. Equal opportunity to education is also imposed by the United States Constitution.

The Fourteenth Amendment simply should not tolerate individual acts which deny equal opportunity in education to Negroes. The act of defendant, if allowed to stand, will deny just that opportunity to Negro children.

Section 5 of the Fourteenth Amendment is capable of three interpretations; the federal government can act against individuals 1) if their acts deny equal utilization of state facilities to an individual; 2) if the practical effect of the private act is great; 3) if their acts discriminate.

We have discussed the "equal utilization" theory at length. The "effect" theory is closely related to equal utilization and was hinted at in *United States* v. *Guest*, 383 U. S. 745 (1966), and in *Reitman* v. *Mulkey*, 387 U. S. 369 (1967). This theory demands that the court measure the effect of the individual's private acts. Referring once again to the problem of education, it can be easily seen that refusal to sell to Negroes by a developer of a subdivision of one thousand houses has quite a different effect than refusal to sell by one owning just one house. The former party may sell thousands of houses over the years while the individual homeowner may sell only once in ten years.

The problem with this approach is the application of quantity to rights which are normally thought of as qualitative. As to the individual Negro denied housing, it matters little to him whether a developer or a homeowner refuses to sell. Clearly, both situations are equally as objectionable under the Constitution. Nevertheless, under

the facts herein, the seller is a developer of subdivisions. The practical effect of his discrimination, and that of others in his position, is staggering.

The third interpretation of Section 5 would be to apply the Fourteenth Amendment to all individual acts and would directly overrule the *Civil Rights Cases.* Judge Blackmun's analysis of the development of the "state action" concept, *Jones* v. *Alfred H. Mayer, supra,* at 379 F. 2d 40-42, did not lead to such a result *only* because of his position on an inferior court. We submit that his analysis of the opinions of this Court compels a decision holding that Section 5 applies to all individual acts.

We respectfully submit that the application of the Fourteenth Amendment does not require "state action" and that, therefore, appellants may maintain this action under 42 U. S. C. § 1982.

IV. IN ANY EVENT THERE IS SUFFICIENT STATE ACTION IN THE CASE AT BAR TO REQUIRE APPLICATION OF THE FOURTEENTH AMENDMENT.

If this Court holds that state action is a vital component of application of the Fourteenth Amendment, we must proceed to an examination of the concept of state action. This concept is ambiguous; in fact, the "equal utilization" and "effect" theories discussed above could be included in an expanded concept of state action.

Since *Buchanan* v. *Warley,* 245 U. S. 60 (1917), it has been understood that the state cannot impose racial restrictions on property. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), made it clear that an individual cannot employ state machinery to enforce a restrictive covenant where there is a willing seller and a willing buyer. State action in *Shelley* v. *Kraemer* is clear. But this does not provide an answer in the instant case without further analysis which

must bear in mind that state action need not be exclusive or direct, *United States* v. *Guest*, 383 U. S. 745 (1966).

By one approach there are two types of state action: 1) a private individual performs a governmental function; 2) a state official or agent is involved in private activities.

The perfect example of the first type of state action was presented in *Marsh* v. *Alabama*, 326 U. S. 501 (1945), where a corporation performed all the functions of a municipality. The court had no trouble holding that the rights secured under the First and Fourteenth Amendments applied to actions by private individuals.

State action in this context is in reality inaction. If this Court views this situation as the Eighth Circuit did, states could easily escape responsibility under the Fourteenth Amendment by simply abdicating their traditional roles and functions.

In the instant case plaintiffs alleged this type of situation —*e.g.* defendant was to perform the normal municipal functions such as the building of streets. The Court dismissed this by saying this was state inaction and did not qualify under the Fourteenth Amendment. This flies directly in the face of the reasoning of *Marsh* v. *Alabama*, 326 U. S. 501 (1945).

The complaint also alleged the second type of direct state action. Plaintiffs pointed out that defendants were incorporated by the state; that building and zoning codes, banking and lending laws and statutes and common law governing the transfer of property affected defendants' acts and were used to the benefit of the defendants in the building of their development. Defendants have no untrammeled freedom to operate their business in any manner that they choose. For example, building codes regulate architectural plans. The final plans are all subject to approval of the county commission. In addition, it would seem that state

financial aid to the public schools which must be built to accommodate subdivisions such as this is an example of direct state action which will be needed in the future.

The Circuit Court of Appeals apparently considered only the corporate licensing of defendants and dismissed this as insignificant and neutral state action. That is, the act of the state was not sufficient to make the Fourteenth Amendment applicable. Without the benefit of *all* of the state acts and laws listed in the complaint, defendants' business enterprise would not have existed. Applying a test from the tort field, "but for" the state's acts defendant could not have been able to build its development and, hence, to discriminate against plaintiffs.

The concept of state action can also be viewed in a different light. There may be a great amount of direct state action. Yet this may have little effect upon the actual denial of rights. On the other hand, there may be a small amount of indirect state aid which may have a great effect upon the denial of rights. We contend that there is enough state action in the present case to justify a decision for plaintiffs. A decision for defendants would adversely affect a large segment of the American public.

One peculiar aspect should be noted about the opinion of the Circuit Court of Appeals. The Court said relief for these plaintiffs lay in *proper* legislation—the Court did not say *state* legislation. The Court could be referring to state or federal legislation. What the Court implies is that such legislation could find validity in the Constitution as it stands today. If that is true, why cannot 42 U. S. C. § 1982 survive on the same Constitutional basis? The Court did not find that 1982 was improperly drawn nor that it was unconstitutional.

The only other interpretation of this aspect of the opinion was reviewed in "Recent Decisions," 56 Ill. Bar Jour.

402 (Jan., 1968). The Court could have meant it would look to the legislation itself to decide if there were state action. This begs the essential question of state action by turning the answer over to those who pass the legislation. The determination of state action can hardly be incorporated into the statute that relies for its validity on state action.

CONCLUSION.

The Thirteenth, Fourteenth and Fifteenth Amendments demonstrated an intention to eradicate the social system which existed before the Civil War. The right to purchase property based upon financial ability and without regard to race should be considered one of the effects of those constitutional changes. With this in mind we suggest that the Court can readily find authority for section 1982 of the Civil Rights Act.

Respectfully submitted,

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SUPREME COURT, U. S.

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v.

ALFRED H. MAYER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (A. 43–66 [1]) is reported at 379 F. 2d 33. The opinion of the district court (A. 15–41) is reported at 255 F. Supp. 115.

JURISDICTION

The judgment of the court of appeals (A. 42) was entered on June 26, 1967, and the petition for a writ of certiorari was granted on December 4, 1967. The jurisdiction of this Court rests on 28 U.S.C. 1254.

[1] Our references are to the record "Appendix" filed by the petitioners, which is bound with a light-gray cover. Another, differently paginated, "Appendix," with a buff-colored cover, has been filed by one group of *amici*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Thirteenth Amendment provides:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

Sections 1 and 5 of the Fourteenth Amendment provide:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 1978 of the Revised Statutes (42 U.S.C. 1982) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Relevant Missouri statutes and provisions of St. Louis County ordinances are printed in the Appendix, *infra,* pp. 63–92).

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment, of its own force, prohibits the developers of a large suburban community from refusing to sell homes in the subdivision to Negroes, solely on account of their race.

2. Whether Section 1978 of the Revised Statutes prohibits such a racial exclusion.

STATEMENT OF THE CASE

On September 2, 1965, petitioners, Joseph Lee Jones and his wife Barbara J. Jones, filed a complaint in the United States District Court for the Eastern District of Missouri, alleging a discriminatory refusal to sell them a home in the Paddock Woods community of St. Louis County because one of them is a Negro (A. 3–13). The defendants (respondents here) were: the Alfred H. Mayer Company, a corporation "engaged in the business of developing subdivisions, * * * operating as a construction company in building homes * * * to be resold to the public" (A. 5); the Alfred Realty Company, "the exclusive sales agent of the houses built by * * * Alfred H. Mayer Company;" Alfred H. Mayer, who "owns a controlling interest in both said corporations" (A. 3–4) and serves as their "managing officer and * * * guiding policy maker" (A. 5); and Paddock Country Club, Inc., a corporation controlled by the other defendants, which operates a golf course "for

the primary use and benefit" of the residents of Paddock Woods and neighboring subdivisions under the same control (A. 10).

According to the allegations of the complaint (which must be taken as true, since the case was dismissed at the pleading stage), Paddock Woods is planned as a complete suburban community (A. 9–11). When completed, the development will house 1,000 people and form part of an even larger complex of similar developments constructed in the area by the same developer, in some cases (not including Paddock Woods) with financing by the Federal Housing Administration (A. 9–10). This complex—which will house a total of some 2,700 families—will include recreational facilities (golf course plus tennis and bath club) built by the developer for the primary benefit of the residents (A. 10). The developer has laid out streets for the use of the residents and has undertaken to provide such community services as garbage collection, all controlled by a board of trustees appointed by him (A. 10–11). The board will also have the legal authority to levy assessments and to collect them through judicial action (A. 11).

In order to create this Paddock Woods community, the respondents were required to comply with the "Subdivision Regulations" embodied in Chapter 1005 of the St. Louis County Ordinances (App. *infra,* pp. 69 *et seq.*), and enacted pursuant to Section 64.060 of the Missouri Statutes. Under those regulations a subdivision may not be developed until the St. Louis County Planning Commission has approved

it. Section 1005.180 provides that there will be no final approval until the developer has either completed or filed a satisfactory surety bond to insure the completion of the following improvements to the land:

(1) Permanent markers showing all subdivision boundary corners and the four corners of all street intersections.

(2) Graded streets and surfaced roadways. All grading and surfacing shall be done under supervision of the County Highway Engineer and shall be subject to approval.

(3) Sidewalks constructed in accordance with St. Louis County specifications.

(4) Facilities for providing a water supply. The ordinance provides for construction of any water supply system under supervision of the County Health Department.

(5) Sewers. In this case the Metropolitan St. Louis Sewer District required an escrow arrangement to guarantee the proper construction of the sewer system and required that the sewers and related appurtenances and easements be dedicated to the sewer district.

(6) Street trees.

(7) Street signs installed under the supervision of the County Highway Engineer.

The regulations further provide for the deposit of a substantial sum in escrow to insure that these improvements are made, stipulating that if the developer fails to complete the improvements in two years, the County Planning Commission may itself use the

escrowed funds to finish the work (Section 1005.180). Various State agencies, including the Planning Commission, the Highway Division, and the Sewer District, are required to inspect the progress of the subdivision during the planning stages and as construction progresses (Section 1005.180).

The complaint particularizes that the petitioners, desiring to purchase a new home and prompted by a public advertisement in the St. Louis *Post-Dispatch,* inspected houses and lots in Paddock Woods; that they offered to buy from respondents a house and lot in the Paddock Woods development; and that the respondents refused to sell to them because petitioner Joseph Lee Jones is a Negro (A. 5–7). Petitioners sought a judgment requiring respondents to sell them a home of the type described in the complaint and enjoining further discrimination in the sale of homes (A. 13). There was also a prayer for actual damages of $50.00 and punitive damages of $10,000 (A. 13).

The district court sustained the respondents' motion to dismiss on May 18, 1966 (A. 14), holding that their action in refusing to sell a house to the petitioners was purely individual and not State action (A. 18–41). On June 26, 1967, the Court of Appeals for the Eighth Circuit affirmed (A. 42).

SUMMARY OF ARGUMENT

I

It is a commonplace of our society that the activities of government and private enterprise are frequently intertwined. This is particularly true of the

large scale planning and investment characteristics of a substantial housing development. Whole new communities are being erected in the suburbs of our cities pursuant to arrangements in which governmental authorities and private entrepreneurs are deeply and jointly involved. Accordingly, the first question in this case is whether there is such a degree of State involvement in the construction of Paddock Woods and its sister communities that its builders take on obligations, as well as privileges, associated with municipalities—more particularly, the obligation under the Fourteenth Amendment to refrain from fencing a minority race out of the community.

We begin with the familiar proposition that the State may not limit the availability of housing on the ground of race, whether by zoning ordinance, restrictive covenant, or the enforcement of segregation by any other means. It is, of course, equally well settled that such restrictions on State action apply as well to instrumentalities which, though private in form, are governmental in substance.

Applying these principles, we conclude that respondents, in operating their new community, act in much the same manner as a municipal corporation. They begin by establishing community boundaries, with the review and approval of the State. With State review and approval they establish streets, sewers, and recreational facilities—services the public has come to expect from its municipal governments. They establish rules which the residents of the community must follow and which the State enforces. They ap-

point a governing body, the board of trustees for Paddock Woods. They furnish continuing services, such as rubbish collection, and levy assessments—enforceable by judicial process—to pay for the services. They enter into compacts with other governmental instrumentalities such as the sewage districts. And these acts are done under the supervision of a complex structure of district, county and State agencies, under State law. In sum, respondents do not occupy the position of an individual property owner. They are clothed in significant measure with State authority, and that authority has served, again in significant measure, to create and sustain the community.

II

Alternatively, we argue that if the respondents' conduct cannot fairly be characterized "State action," governed by the Equal Protection Clause of its own force, it is nevertheless prohibited by Section 1978 of the Revised Statutes (42 U.S.C. 1982).

That statute, first passed in 1866 to enforce the Thirteenth Amendment and re-enacted in 1870 after the adoption of the Fourteenth Amendment, implements both constitutional provisions. In our view, it reaches at least all measures, official or unofficial, which have the purpose and effect of wholly fencing out an entire racial class from a substantial residential community, In those circumstances, we think it plain the excluded class is effectively deprived of the statutory guarantee that they shall have "the same right * * * as is enjoyed by white citizens * * * to * * * purchase [and] lease * * * real * * * property."

Examination of the context and legislative history of the provision reveals no reason not to give the text its natural meaning. The provision was designed to grant more than mere legal capacity to hold real estate, as decisions of this Court make plain. Nor do we believe there exists any textual, historical, or constitutional obstacle to applying Section 1978, as its words suggest, to wholly private action—at least when the conduct involved threatens the right guaranteed as effectively as State action. And, finally, we submit the provision prohibits equally outside coercion against willing buyers and sellers and, as here, a voluntary policy of fencing out Negroes.

ARGUMENT

I. THE FOURTEENTH AMENDMENT, OF ITS OWN FORCE, PROHIBITS THE CONDUCT DESCRIBED IN THE COMPLAINT

A. THE FOURTEENTH AMENDMENT FORBIDS STATE ACTION SUPPORTING RACIAL SEGREGATION IN HOUSING

It is of course well settled that the "Fourteenth Amendment * * * operate[s] to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." *Buchanan* v. *Warley,* 245 U.S. 60, 79. See, also, *Harmon* v. *Tyler,* 273 U.S. 668; *Richmond* v. *Deans,* 281 U.S. 704. Nor is it only legislative measures that are reached. Judicial enforcement of racially restrictive covenants is equally forbidden by the Amendment (*Shelley* v. *Kraemer,* 334 U.S. 1; and see *Barrows* v. *Jackson,* 346 U.S. 249), as are less compulsive forms of State action. *Reitman* v. *Mulkey,* 387 U.S. 369.

Thus, it is plain that the complete exclusion of Negroes from the community in suit—a fencing out of much more substantial proportions than was involved in the cases cited—would fall under the ban of the Fourteenth Amendment if the action of the corporate owner may properly be characterized as "State action."

In approaching that question it is relevant to notice that the right to freedom from discrimination in housing has enjoyed a special status under the Fourteenth Amendment. Indeed, that Amendment was proposed, in part, to vindicate and place beyond repeal the Civil Rights Act of 1866 (14 Stat. 27), which already guaranteed citizens "of every race and color" the "same right * * * to inherit, purchase, lease, sell, hold, and convey real and personal property * * * as is enjoyed by white citizens."[2] And the same provision was re-enacted as part of the very first measure implementing the Amendment. Act of May 31, 1870, § 18, 16 Stat. 140, 144 (see Point II, *infra*, pp. 20 *et seq.*).

Nor has this Court ignored the unique claim of this civil right under the Equal Protection Clause. The fact is that State-imposed residential segregation was held unconstitutional as early as 1917 (*Buchanan* v. *Warley, supra*) at a time when enforced segregation in public and private schools (*Berea College* v. *Ken-*

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[2] See *Civil Rights Cases*, 109 U.S. 3, 22; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Buchanan* v. *Warley*, *supra*, 245 U.S. at 78–79; *Oyama* v. *California*, 332 U.S. 633, 640, 646; *Shelley* v. *Kraemer*, *supra*, 334 U.S. at 10–11; *Hurd* v. *Hodge*, 334 U.S. 24, 32–33; *Takahashi* v. *Fish Comm'n*, 334 U.S. 410, 419–420.

tucky, 211 U.S. 45; see *Gong Lum* v. *Rice,* 275 U.S. 78, 85–87; *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 344, 349), transportation (*Plessy* v. *Ferguson,* 163 U.S. 537; see *McCabe* v. *Atchison, Topeka & Santa Fe Railway Co.,* 235 U.S. 151, 160), and in other activities (*e.g., Pace* v. *Alabama,* 106 U.S. 583) was condoned. So, also, it is revealing that in the restrictive covenant cases (*Shelley* v. *Kraemer, supra; Hurd* v. *Hodge, supra; Barrows* v. *Jackson, supra*), the Court found prohibited "State action" in the apparently neutral judicial enforcement of private discriminatory agreements—invoking a doctrine which it has declined to follow elsewhere. See, *e.g., Bell* v. *Maryland,* 378 U.S. 226, 328–333 (opinion of Black, J., dissenting). As was observed in *Shelley* v. *Kraemer, supra,* 334 U.S. at 10:

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. * * *

We accordingly conclude that the Fourteenth Amendment's injunction against discrimination is to be applied strictly to residential segregation and that it is indeed appropriate to search out State action which supports discrimination of this character.

B. THE RESPONDENTS EXERCISE STATE POWER AND PERFORM GOVERNMENTAL FUNCTIONS

This Court early recognized that the Fourteenth Amendment's restrictions on action by the "State" extend to one who "acts in the name and for the State, and is clothed with the State's power * * *." *Ex parte Virginia,* 100 U.S. 339, 347. The restrictions cover "exertions of state power in all forms". *Shelley* v. *Kraemer, supra* at 20. The reason is clear: "This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Ex parte Virginia, supra.* The words "No State shall" are "addressed, of course, to the States, but" the limitations of the Amendment were to extend "also to every person whether natural or juridical who is the repository of state power." *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U.S. 278, 286. Thus it was said in *Virginia* v. *Rives,* 100 U.S. 313, that "the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by [its legislative, executive, or judicial authorities] or *by another.*" 100 U.S. at 318 (emphasis added).

Following this consistent interpretation of the Amendment, this Court has found "State action" in a variety of instances: actions of a municipal corporation even though unauthorized (*Home Telephone and Telegraph Co.* v. *Los Angeles,* 227 U.S. 278); actions of law officers contrary to State law (*Screws* v. *United States,* 325 U.S. 91; *Williams* v. *United*

States, 341 U.S. 97); actions of a private corporation with the characteristics of a municipality (*Marsh* v. *Alabama,* 326 U.S. 501); actions of a private political party carrying out the State function of determining voter eligibility for primary elections (*Nixon* v. *Condon,* 286 U.S. 72; *Terry* v. *Adams,* 345 U.S. 461); actions of a private restaurateur providing food service in a city-owned parking structure (*Burton* v. *Wilmington Parking Authority,* 365 U.S. 715); and actions of private trustees of a private city park which had formerly been held and maintained by the city (*Evans* v. *Newton,* 382 U.S. 296). Similarly, constitutional limitations have been held applicable to those who exercise essentially governmental power derived from federal law, whether a regulated public transit monopoly (*Public Utilities Comm'n* v. *Pollack,* 343 U.S. 451) or labor unions recognized as exclusive bargaining agents of a class of employees (*Steele* v. *L. & N.R. Co.,* 323 U.S. 192; *Railroad Trainmen* v. *Howard,* 343 U.S. 768; *Syres* v. *Oil Workers,* 350 U.S. 892; see *Machinists* v. *Street,* 367 U.S. 740).

In none of these cases were the condemned acts expressly authorized by law; in some, they were explicitly prohibited; and in several, the acts were committed by "private" parties. The one common denominator is that in each instance the actor was a repository of some aspect of State power. Because they possessed State power they were held to have assumed State obligations in its exercise.

The same principle, we believe, controls this case. To be sure, no State flag flies over Paddock Woods

and none of the respondents wears an official badge of State office. But, as *Marsh* and *Terry* v. *Adams* make clear, that is not critical. As we show presently, there are continuing legal ties between the State and the housing development in suit. Yet, even that formal connection is not essential. The controlling considerations in this case, it seems to us, are that Paddock Woods exists by virtue of a delegation of State powers, and that those who rule the community, although they wear no uniform and hold no official title, wield those powers to perform essentially governmental functions.

That is, in part, a consequence of size. To take extreme examples, we suppose no one would question the applicability of constitutional restrictions to the immense land holdings of the private stock companies and individual proprietaries of early America if they existed today. Indeed, although the Virginia Company (after 1609) elected its own governing board and managed its large domain without official aid or interference, and Lord Baltimore held Maryland as a private owner, it is obvious they were exercising governmental powers. See 1 Morison and Commager, *The Growth of the American Republic* (1962), pp. 43–48, 52–53; Commager, *Documents of American History* (6th ed. 1958), pp. 10–13; 21–22. So, here, albeit in much smaller compass, the managers of Paddock Woods must necessarily wield the authority of local governors because their community is, in most respects, a "town."

Indeed, in most essential respects, Paddock Woods is comparable to the company towns involved in *Marsh*

v. Alabama, supra, and *Tucker* v. *Texas,* 326 U.S. 517, which the Court held were subject to constitutional limitations applicable to municipalities. Here, as there, "the corporation's property interests [do not] settle the question" (326 U.S. at 505); that circumstance "cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations" (*id.* at 511, Frankfurter, J., concurring).

A review of the creation and maintenance of Paddock Woods shows that the existence of such a subdivision is made possible by the State; that the State expects (and in some cases requires) the managers of the new community to fill the gap that results from the absence of any formal municipal government in Paddock Woods; and that the State has invested them with the coercive tools for regulating and taxing the inhabitants of Paddock Woods so that they may fulfill these duties.

The creation of a whole suburban community raises problems unknown to the individual homeowner or the city apartment owner. The developer begins with a plot of land reflecting none of the characteristics of a modern community. A subdivision, however, must have public roads and sidewalks, sewers, parks, access to schools, police and fire protection. In Missouri, as in other States, these services and facilities are supplied by or on behalf of the State.[8] The subdivider

[8] See authority given political subdivisions by Mo. Stat. §§ 71.340 (construct and repair public roads), 80.180 (provide sidewalks), 90.010 (establish and maintain parks), 89.040 (zoning power to facilitate adequate provisions for schools), 80.260 (maintain peace), 71.380 (fire protection).

provides many of them: by obtaining State approval of his plans, by building streets and sewers and dedicating them to the State, by paying for fire protection, by transferring park land to trustees he appoints. He provides such services because business considerations and State law require it.[4] On occasion, the State law requirement is contingent on there being no municipality which can perform the function.[5]

A subdivision developer must not only provide physical facilities and services; he must establish rules for governing the community. Restrictions, in essence zoning laws, must be placed on the use of the property. This essential State function (see *Village of Euclid* v. *Ambler Realty,* 272 U.S. 365) is delegated by the State to the subdivider.[6] And the respondents

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[4] See St. Louis County Ordinances, Chap. 1005, § 1005.180 (markers, streets, sidewalks, water and sewage systems, fire protection, trees, signs), § 1005.160 (schools and parks).

[5] St. Louis County Ordinances, Chap. 1005, § 1005.150 provides that maintenance for public facilities must be provided by the subdivision developer if no other public agency is available. It may be noted that Paddock Woods meets the qualifications set by Mo. Stat. § 72.040 for "cities of the fourth class" and, therefore, the residents could incorporate as a municipality if they elected to do so.

[6] Section 1005.150 of the St. Louis County Ordinances provides:

> The Commission shall confer with the subdivider regarding the type and character of development that will be permitted in the subdivision and may agree with the subdivider as to certain minimum restrictions to be placed upon the property to prevent the construction of substandard buildings, control and the type of structures, or the use of the lots which, unless so controlled, would clearly depreciate the character and value of the proposed subdivision and of adjoining property. Deed restrictions or

have utilized this authority to promulgate "zoning ordinances" in the form of restrictive covenants which, among other things, forbid homeowners from using their lots for commercial businesses, temporary structures, signs, livestock, poultry, and noxious or offensive activity.[7] These covenants are, of course, enforceable in the State's courts. See, *e.g.*, *Andrews* v. *Metropolitan Bldg. Co.*, 349 Mo. 927, 163 S.W. 2d 1024.

So, also, one of the main attributes of a municipal government is its power to levy assessments for cer-

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covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future, provided, however, that such deed restrictions or covenants shall not contain reversionary clauses wherein any lot shall return to the subdivider because of a violation thereon of the terms of the restrictions or covenants. Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily maintained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities, for the proper and continuous maintenance and supervision of such facilities.

Compare Mo. Stat. 89.040 setting out the purposes for which the municipal zoning power might be used and stating that "regulations shall be made with reasonable consideration * * * to the character of the district * * * and with a view to conserving the values of buildings * * *."

[7] Compare Mo. Stat. 89.030 granting local legislative bodies a zoning power which may be used to "regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures, or land."

tain limited public purposes. Respondents have that power to levy assessments for community improvements and, if necessary, to establish property liens to secure payment of the assessments.[8] The new members of the community will also, in effect, pay a tax (in the form of a higher price for their homes) to defray the cost of establishing streets, sidewalks, sewers, a water system, and the other municipal facilities furnished by the respondents.

Thus, it is clear that the respondents, in activities essential to the development of the Paddock Woods community, are clothed with State authority, and daily perform governmental tasks, making and executing essentially governmental decisions. The claim is advanced, however, that the exclusion of Negroes from Paddock Woods is not a decision of that character, but, rather, the exercise of a private landowner's prerogative to sell or refuse to sell to anyone, on any ground. We turn to that argument.

C. THE RESPONDENTS ARE GOVERNED BY THE FOURTEENTH AMENDMENT IN THEIR ADMISSION POLICY

The suggestion that respondents, as owners and operators of Paddock Woods, are repositories of State power—and therefore subject to the Fourteenth Amendment—for some purposes, but not with respect

[8] It is so alleged in the complaint (A. 11), which must be accepted as stating the true facts. Presumably the power to levy assessments is incorporated in the trust instrument pursuant to the last sentence of Section 1005.150 of the St. Louis County Ordinances, quoted in note 6, *supra*. Compare Mo. Stat. § 71.290 giving Missouri towns and vilages power to levy assessments for public improvements.

to their admission policy (see A. 36–37), does not withstand scrutiny. There is no basis for characterizing the racially exclusive policy followed here as a "private" decision, unrelated to respondents' status as delegates of the State, exercising governmental functions.

There is no precedent for the suggestion that a State agency may avoid the mandate of the Constitution for some of its actions. Certainly, the State itself is no more free to discriminate when acting in a "proprietary" capacity than when performing a "governmental" function. Cf. *Burton* v. *Wilmington Parking Authority, supra.* So, also, a State officer, so long as he wears the clothes of office, is subject to the Fourteenth Amendment, although his acts are unauthorized by law (*Ex parte Virginia, supra*) or even contrary to State law (*Screws* v. *United States, supra*). Nor is that obligation avoided because the official is serving his own ends or other private interests, rather than those of the State. *Pennsylvania* v. *Board of Trusts,* 353 U.S. 220; *Griffin* v. *Maryland,* 378 U.S. 130. Cf. *Shelley* v. *Kraemer, supra.* Similarly, here, we see no basis to exempt the action of the managers of Paddock Woods in formulating and executing a policy of racial exclusion.

The fact is, moreover, that, both in origin and effect, the total fencing out of Negroes from a community of this size is itself an exercise of governmental power. Indeed, it is only by virtue of delegated authority from the State that this "private town" exists and that the municipal functions are controlled by a

single corporation. In these circumstances, the company's decision to adopt a policy of racial exclusion is not remotely like that of an individual landowner. The decision is made on behalf of the entire community, presumably motivated by the same public considerations that would influence a municipal government. Realistically viewed, it is an impermissible exercise of the zoning power.

And, of course, the effect is the same. Just as the State in *Terry* v. *Adams* could not "permit within its borders the use of any device that produces an equivalent of the prohibited election" (345 U.S. at 469), so, here, the respondents may not, by their exclusionary policy, produce the equivalent of a forbidden racial zoning ordinance.

II. THE CHALLENGED CONDUCT IS ALSO EMBRACED BY SECTION 1978 OF THE REVISED STATUTES

We have attempted to show that the Fourteenth Amendment, of its own force, outlaws the conduct revealed in the record. We believe that argument is fully sufficient to support the present complaint. Petitioners, however, have consistently contended that their case is also ruled by Section 1978 of the Revised Statutes, 42 U.S.C. 1982, which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This statutory argument raises a discrete set of issues. Although Section 1978, in our view, reaches both acts taken "under color of law" and wholly private action, we

invoke the provision, alternatively, only on the premise that the challenged conduct is not State action and accordingly is not governed by the Equal Protection Clause, *ex proprio vigore.*

At the outset, we note that Section 1978—unlike 18 U.S.C. 241—is not one of those "hastily adopted" products of "[s]trong postwar feeling [that] caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues" (*United States* v. *Williams,* 341 U.S. 70, 74, opinion of Frankfurter, J.). Nor was it—as has been said of 42 U.S.C. 1985—the work of extremist Radicals, "passed by a partisan vote in a highly inflamed atmosphere" (*Collins* v. *Hardyman,* 341 U.S. 651, 657). Section 1978 has an older and more authentic pedigree. Together with its companion, Section 1977 (42 U.S.C. 1981), it derives from Section 1 of the first Civil Rights Act, of 1866 (14 Stat. 27), passed, after full debate,[9] in the relative calm of the 39th Congress which framed the proposal for the Fourteenth Amendment. The legislation was no aberration of the moment: it survived only because both the House and the Senate—neither yet dominated by Radical Republicans (See Stampp, "The Era of Reconstruction, 1865–1877" (1965), pp. 83–86, 110–117)—overrode a presidential veto by the requisite majorities (see Cong. Globe, 39th Cong., 1st Sess., pp. 1809, 1861), and it

[9] The debates on the Civil Rights Act of the Act of 1866 cover some 134 pages in the Congressional Globe. See Cong. Globe, 39th Cong., 1st Sess., pp. 211–212, 474–481, 497, 507, 522–530, 569–578, 594–606, 1115–1125, 1151–1162, 1262–1272, 1290–1296, 1366–1367, 1413–1416, 1755–1761, 1775–1787, 1801–1809, 1832–1837.

was expressly re-enacted 4 years later (Act of May 31, 1870, § 18, 16 Stat. 140, 144) and codified in the Revised Statutes of 1874 and 1878. Indeed, in the landmark *Civil Rights Cases,* 109 U.S. 3, 16, 22, invalidating provisions of the Civil Rights Act of 1875, this Court contrasted that last measure of the Reconstruction series with the first, which was viewed as a model of constitutional legislation. It was there observed, with obvious approval, that in 1866 "Congress did not assume * * * to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." 109 U.S. at 22.

Nor have the provisions of the Civil Rights Act of 1866 remained a dead-letter since they were given their place in the Revised Statutes. As early as *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369, Section 1977 was successfully invoked against racial discriminations with respect to property. No constitutional doubts have been expressed with respect to this first section of the 1866 Act, once it was "vindicated" by the Fourteenth Amendment (*Ogama* v. *California,* 332 U.S. 633, 640). Compare *Collins* v. *Hardyman, supra,* 341 U.S. at 659. And no one has ever suggested that it was repealed, impliedly or otherwise, by the Act of February 8, 1894 (28 Stat. 36), which was thought to have "wiped from the statute books" "every trace of the reconstruction measures" relating to the "purity in

elections" (H. Rep. No. 18, 53d Cong., 1st Sess., p. 7). Compare Mr. Justice Lamar, dissenting, in *United States* v. *Mosley*, 238 U.S. 383, 389–391, and Mr. Justice Douglas, dissenting, in *United States* v. *Classic*, 313 U.S. 299, 334–335, and in *United States* v. *Saylor*, 322 U.S. 385, 390–392. On the contrary, since that time, Sections 1977 and 1978 have been cited in several cases in this Court in support of comparable rulings [10]—often in tandem with the Fourteenth Amendment, which is repeatedly recognized as having a special relationship to the contemporary statute (see note 2, *supra*). Compare 18 U.S.C. 252 (originally § 2 of the Civil Rights Act of 1866) which has reached this Court in only four cases since its enactment in 1866, for the first time in 1940 after an apparently total repose of 75 years (*United States* v. *Classic, supra; Screws* v. *United States*, 325 U.S. 91; *Williams* v. *United States*, 341 U.S. 97; *United States* v. *Price*, 383 U.S. 787). And see *District of Columbia* v. *Thompson*, 346 U.S. 100, rejecting the contention that a law of 1872 prohibiting discrimination in places of public accommodation in the District of Columbia, actually removed from the statute books, had lost its force by implied repeal or "desuetude."

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[10] We put to one side instances in which Sections 1977 and 1978 were cited in support of rulings banning racial discrimination in jury selection (*e.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303, 311–312; *Virginia* v. *Rives*, 100 U.S. 313, 317–318) or were unsuccessfully invoked against private discriminations in employment (*Hodges* v. *United States*, 203 U.S. 1). See, also, *United States* v. *Wong Kim Ark*, 169 U.S. 649, 675, 696–699; *McLaughlin* v. *Florida*, 379 U.S. 184, 192.

It is no ground of objection that present conditions suggest new applications for the old words. As Mr. Justice Holmes observed for the Court in *United States* v. *Mosley, supra,* 238 U.S. at 388, applying the broadly worded provision before him to circumstances far removed from those which prompted its enactment, "we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." That same approach was followed in *United States* v. *Classic, supra,* to reach the conclusion that Sections 241 and 242 of the Criminal Code punish conduct effectively denying the right to vote in primaries, an institution unknown when those provisions were written a century earlier. And it is the principle that informed this Court's unanimous decision two Terms ago in *United States* v. *Price, supra,* which, for the first time, applied Section 241 to vindicate rights guaranteed by the Fourteenth Amendment.[11] So here, we submit there should be no resort to "ingenious analytical instruments" to avoid giving Section 1978 "a sweep as broad as its language" (383 U.S. at 801)—even though its application in the present context, unfamiliar to the framers, has no established precedent. Indeed, there is less reason for concern here than there was in the criminal prosecutions just cited. The present suit for an injunction permits the Court to make a ruling which, if novel,

[11] So, also, *United States* v. *Guest*, 383 U.S. 745, ruled, for the first time, that Section 241 protects the right to travel interstate against wholly private conspiracies.

will operate only for the future, imposing no civil or criminal liability for the past without adequate notice.[12] Compare Mr. Justice Douglas, dissenting, in *United States* v. *Classic, supra,* 313 U.S. at 331–332, 336, 341; Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson, dissenting, in *Screws* v. *United States, supra,* 325 U.S. at 149 *et seq.*; Mr. Justice Harlan, concurring in part and dissenting in part, and Mr. Justice Brennan, concurring in part and dissenting in part, in *United States* v. *Guest, supra,* at 773–774, 785–786. See, also, *James* v. *United States,* 366 U.S. 213, 221–222 (opinion of the Chief Justice); *Bouie* v. *City of Columbia,* 378 U.S. 347.

Finally, we stress that the application of Section 1978 to the circumstances of this case does not attempt to make it do service as a comprehensive modern housing law. By its terms, Section 1978 bars only *race* and *color* discrimination; and, whatever its broader reach, we invoke the provision here only

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[12] Since, by hypothesis, the present argument would apply Section 1978 to conduct not taken "under color of law," individual action violating the substantive guarantees of the provision would in no event subject the offender to civil damages under 42 U.S.C. 1983 or criminal penalties under 18 U.S.C. 242 (both of which reach only acts done "under color of law"). If damages may be recovered from a single violator, it is under the common law of the State (see 42 U.S.C. 1988) or by virtue of a remedy fashioned by the federal courts (see *Wheeldin* v. *Wheeler*, 373 U.S. 647, 660–667) (dissenting opinion of Mr. Justice Brennan). On the other hand, when "two or more persons" join in a conspiracy to violate Section 1978, whether or not they are acting "under color of law," federal statutes expressly makes them liable both to pay civil damages and to suffer criminal penalties. 42 U.S.C. 1985(3); 18 U.S.C. 241.

against a massive effort to exclude an entire ethnic group from a community. There is no occasion to decide in this case whether individual real estate transactions or occasional acts of discriminations are affected. Our present submission is confined to the proposition that Section 1978 comes into play when official or unofficial action has the practical effect of so severely restricting Negroes (or another racial class) from renting or buying homes in an area that it may fairly be said that they no longer "have the same right * * * as is enjoyed by white citizens * * * to * * * purchase [and] lease * * * real * * * property."

It is already well-settled that local zoning ordinances which "fence out" Negroes from chosen neighborhoods offend the statute. *Buchanan* v. *Warley,* 245 U.S. 60. And so does judicial enforcement of private restrictive covenants with the same purpose and effect. *Hurd* v. *Hodge,* 334 U.S. 24. Applying Section 1978 here would add only those relatively rare instances in which wholly private action can achieve discrimination on a comparable scale. Normally, that would require a perfect concert of action by a substantial number of property owners—perhaps an unlikely eventuality today. But, occasionally, as here, a single individual or corporation is in a position to control entry to an entire residential community. Our submission is only that, in those circumstances, Section 1978 is equally applicable although the result is accomplished without active governmental intervention.

It remains to demonstrate that Section 1978, fairly read, governs our case. We consider in turn three possible objections to such an application: (1) that the provision merely guarantees to Negroes (and other non-white citizens) the same abstract right to purchase, lease and hold property as is enjoyed by whites, free of measures (almost necessarily laws) which wholly disable or incapacitate them on account of their race; (2) that, at all events, Section 1978 reaches only "State action" or conduct taken "under color of law"—which, for the purposes of the present argument, we assume is not involved here; and, finally, (3) that (whatever its scope in other respects) the statute does not control a voluntary refusal to sell or lease, but combats only outside forces inhibiting the action of willing parties.

A. SECTION 1978 REACHES ANY SUBSTANTIAL "FENCING OUT" OF AN ENTIRE RACIAL CLASS

Because it was originally enacted in furtherance of the Thirteenth Amendment (before the adoption of the Fourteenth) and speaks in general terms of the "right * * * to inherit, purchase, lease, sell, hold, and convey" property, Section 1978 might be thought merely to lift the former total legal disability of slaves to acquire any interest in real property. But that would be a grudging reading of broad language, at odds with the teaching of *Mosley* and *Classic* and *Price* (*supra*, p. 24), which, moreover, would present some purely textual difficulties. Nor would such a construction faithfully reflect the setting of 1866 or subsequent history. And, at all events, confining Sec-

tion 1978 to that narrow scope would require repudiation of several decisions in this Court, including *Buchanan* v. *Warley* and *Hurd* v. *Hodge, supra.*

1. The statutory text itself indicates a purpose to grant more than bare legal capacity to acquire real property

On its face, Section 1978 certainly need not be read as merely granting the Negro legal capacity to hold property. To be sure, what is guaranteed is a "right" to inherit, purchase, or lease. But that is not necessarily a narrow term, wholly exhausted in the technical concept of "competence." A sufficient example is that of the "right to vote" which has been held to include not only official recognition of qualification, but the right actually to cast a ballot (*Ex parte Yarbrough,* 110 U.S. 651), to have it counted (*United States* v. *Mosley, supra,* 238 U.S. at 386; *United States* v. *Classic, supra,* 313 U.S. at 315), and not to have its effect diluted by illegal votes (*United States* v. *Saylor, supra,* 322 U.S. at 388–389) or other devices (*Gray* v. *Sanders,* 372 U.S. 368, 380). And, most relevantly, the "right to vote" without discrimination on account of race has been held to preclude measures which deliberately "fence out" from a constituency otherwise qualified voters—who remained free to vote elsewhere. *Gomillion* v. *Lightfoot,* 364 U.S. 339. So, here, there is no reason to suppose that Section 1978 makes an empty promise which is satisfied if Negroes are theoretically eligible to buy or rent a home, although, in fact, they are banned (by law or otherwise) from many or most communities. The more natural construction is that the "right" to acquire property

includes at least a guarantee against being absolutely "fenced out" from any substantial area.

What is more, any other result would be difficult to square with the precise wording of Section 1978. Indeed, the provision does not grant Negroes "the right" to acquire property, but, rather, "the *same* right * * * as is enjoyed by white citizens." Thus, there is a guarantee of equal treatment, which is violated if the Negro, although recognized as having capacity to hold property, is in any substantial respect disadvantaged in the enjoyment of his right. The most obvious instance of such an abridgment or dilution of the right is that in which the Negro is told: "You may buy or rent a house, but not in this community." Surely, in this hypothesis, the excluded class does not "enjoy" the "same right" as those who are free to reside anywhere.

2. The legislative history and background of the statute confirm this broader purpose

What the text itself suggests is confirmed by relevant history. The Civil Rights Act of 1866 was written against the background of the so-called "Black Codes" of the Southern States, then recently adopted to supplant the old slave codes which the Thirteenth Amendment made obsolete. These new laws—defining the rights and duties of both the recently emancipated former slaves and those who were already "free persons of color"—certainly did not accord the Negro equal treatment. Indeed, as has been noted here, in some cases they worked a practical re-enslavement of the race. See, *e.g., Bell* v. *Maryland,* 378 U.S. 226,

247 (opinion of Mr. Justice Douglas), 303, n. 21 (opinion of Mr. Justice Goldberg); and see, *Slaughter-House Cases,* 16 Wall. 36, 70. But, however discriminatory they were, it does not appear that any of the Black Codes denied the capacity of the Negro to acquire and hold property, real or personal. On the contrary, one standard history, summarizing these laws, observes that they "conferred upon the freedmen fairly extensive privileges [and] gave them the essential rights of citizens to contract, sue and be sued, own and inherit property * * * " (Morison and Commager, *The Growth of the American Republic* (1950), p. 17, as quoted by Mr. Justice Douglas in *Bell* v. *Maryland, supra,* 378 U.S. at 247-248, n. 3). See McPherson, *The Political History of the United States of America During the Period of Reconstruction* (1871), pp. 29-44. Even South Carolina, reportedly one of the two least generous States on this matter (Morison and Commager, *op. cit. supra;* 1 Oberholtzer, *A History of the United States Since the Civil War* (1936), p. 129), expressly ordained in December 1865 that, "although [persons of color] are not entitled to social or political equality with white persons, they shall have the right to acquire, own, and dispose of property * * *." See Sen. Ex. Doc. No. 6, 39th Cong., 2d Sess., p. 202. Comparable provisions were common. See the laws of North Carolina and Georgia and the constitution of Texas, summarized in H. Ex. Doc. No. 118, 39th Cong., 1st Sess., pp. 3, 18, 33. Thus, the real problem for the Congress in 1866 was *not* to nullify local statutes which wholly

disabled the Negro with respect to property, or even to clarify his status on this score.

What, then, was the congressional purpose in securing to the freedman "the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property"? Were the legislators of 1866 knowingly indulging in a vain and empty gesture? Or were they ignorant of the true conditions of the South? The first suggestion would be an unworthy accusation against the great emancipators of the 39th Congress. They were realists, not theorists. We may take the word of Senator Trumbull, the Chairman of the Judiciary Committee and the sponsor of the Civil Rights Act of 1866, that he and his colleagues were not interested in declaring "abstract truths and principles," but, rather, in securing "practical freedom" for the Negro. Cong. Globe, 39th Cong., 1st Sess., p. 474. See, also, Senator Howard at *id.*, pp. 503–504. Nor is the vigorous opposition encountered in both Houses and the President's veto consistent with the view that the measure merely solemnized what no one contested, that the colored man was now legally competent to own and acquire property.

The actual problem was somewhat different: it was that many of the Southern States, while conceding the legal capacity of the Negro to hold all kinds of property and to engage in real estate transactions, severely limited the practical exercise of these new rights. Sometimes the theoretical right to purchase or lease a home was indirectly defeated by a requirement that

the freedman be employed by a white man and live on the master's property. Morison and Commager, *op. cit. supra;* see, *e.g.,* the Louisiana law reprinted in S. Ex. Doc. No. 6, *op. cit. supra,* at p. 181. Elsewhere, severe restrictions on freedom of movement must have had much the same effect. See, *e.g.,* the Mississippi Statute reprinted in S. Ex. Doc. No. 6, *op. cit. supra,* at 194. But there were also express provisions barring Negroes from living in certain areas, except as servants, by prohibiting them from renting or buying real estate there. Mississippi excluded them as landholders in the country. See S. Ex. Doc. No. 6, *op. cit. supra,* p. 193. In Louisiana, there were local regulations prohibiting Negroes from having their own homes or business premises in towns (see S. Ex. Doc. No. 2, 39th Cong., 1st Sess., pp. 92, 95), and comparable restrictions in some rural areas. See Fleming, *Documentary History of Reconstruction* (1906), p. 279. More limited handicaps were common also: freedmen were not permitted to own or operate certain businesses (see S. Ex. Doc. No. 6, *op. cit. supra,* at p. 204, 215) and their contracts with respect to property were encumbered with special formalities. See, *e.g.,* the laws of North Carolina and South Carolina, reprinted in Sen. Ex. Doc. No. 6, *op. cit. supra,* at pp. 198, 216.

This was the evil to which Congress was addressing itself: not the absolute disabling of the Negro, but the serious practical abridgments placed on his freedom to contract and his rights with respect to property. The examples we have given were cited again and again in the debates on the Civil Rights Bill and on

companion measures. Cong. Globe, 39th Cong., 1st Sess, pp. 39, 111, 474, 475, 516–517, 603, 1755, 1759. To be sure, there were occasional overstatements. The law of Mississippi was sometimes said to bar Negroes from holding real property anywhere in the State, (*e.g., id.* at pp. 1160, 1759); but, as often, it was correctly represented as applying only to rural areas. *E.g., id.* at pp. 39, 111. And provisions of local law nominally guaranteeing the Negro the right to acquire and hold property were brought to the attention of Congress. *E.g., id.* at pp. 1755, 1785. In sum, the authors of the Civil Rights Act of 1866 were obviously well aware of the true legal status of the freedman in the South and were concerned to combat *discriminations,* not *disabilities.* Practical equality of right was the aim of their work. See *id. at* 1117–1118, 1293, 1413. It is, therefore, no accident that the law they framed is formulated in those terms: the Negro shall "enjoy" "the *same* right" as whites.

The true purpose of Section 1978 is sufficiently revealed in the circumstances of its original enactment in 1866. But, as already noted, the provision we know derives more directly from the Revised Statutes of 1874[13] and the re-enactment of the Civil Rights Act

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[13] Although the congressional mandate was somewhat restricted (14 Stat. 74), the Revision of 1874, formally enacted into law (see R.S. § 5601), in fact worked important substantive changes in the prior statutes which have been accepted as effective. See, *e.g.*, the significant expansion of Section 2 of the Civil Rights Act of 1866, the progenitor of 18 U.S.C. 242, recognized in *Screws* v. *United States*, *supra*, 325 U.S. at 99–100, 120–125, and *United States* v. *Price*, *supra*, 383 U.S. at 802–803. See, also, *United States* v. *Mosley*, *supra*, 238 U.S. at 388 (in-

in 1870, after the adoption of the Fourteenth Amendment. Accordingly, it is relevant to note the conditions then prevailing which were deemed to require reaffirming the guarantee of non-discrimination with respect to the "right to purchase and lease real property."

The fact is that most, if not all, of the former Confederate States, now under the control of "reconstructed" legislatures, had by that time progressed so far as formally to ban racial discrimination even in privately-owned places of accommodation. *E.g.,* La. Const. 1868, Art. 13; La. Acts 1869, p. 37; La. Acts 1870, p. 57; La. Acts 1873, p. 156; 14 S.C. Stat. 179; Ga. Laws 1870, pp. 398, 427–428; Ark. Laws 1873, pp. 15–19; Miss. Laws 1873, pp. 66; Fla. Laws 1873, p. 25. And see, Stephenson, *Race Distinctions in American Law* (1910), pp. 115–116; 2 Fleming, *Documentary History of Reconstruction* (1907), pp. 285–288. And those laws were not wholly unenforced. See, *e.g., Sauvinet* v. *Walker,* 92 U.S. 90; *Hall* v. *DeCuir,* 95 U.S. 485; *Joseph* v. *Bidwell,* 28 La. Ann. 382; *Donnell* v. *State,* 48 Miss. 661. Indeed, the premise of the decision here in the *Civil Rights Cases,* 109 U.S. 3, was that the federal public accommodations law enacted in 1875 was a needless intrusion because racial

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volving the 1874 revision of what is now 18 U.S.C. 241); *Georgia* v. *Rachel,* 384 U.S. 780, 789–790 (involving the 1874 revision of what is now 28 U.S.C. 1443). On the other hand, the Revision published in 1878—clearly intended only to collect the laws then in force without changing their scope (19 Stat. 268; and see the Preface by Commissioner Boutwell to the 1878 Edition of the Revised Statutes, pp. v–vi)—is relevant only in that it did not drop Section 1978 as "obsolete."

discriminations in such facilities were then barred "by the laws of all the States." *Id.* at 25; see, also, *id.* at 19, 24. Thus, it is plain that in re-enacting the 1866 Act in the 1870's Congress could not have been concerned about any failure of local law to recognize the abstract right of the Negro to acquire or hold real property. As we shall presently show, the congressional focus, from 1870 on, was no longer fixed on hostile statutes. The new problem for the Congress was, rather, unofficial conduct—notably the doings of the Ku Klux Klan (see *United States* v. *Mosley, supra,* 238 U.S. at 387–388; *Collins* v. *Hardyman, supra,* 341 U.S. at 662)—and discriminatory acts of officials, taken independently of State law (see *Monroe* v. *Pape,* 365 U.S. 167, 174–183). These no doubt included efforts to fence out Negroes from certain areas—and it is in that light that we should appraise the renewed declaration of the broad guarantees announced in Secton 1978.

3. The jurisprudence of this Court gives the statute a broader reach

We turn, finally, to the cases in this Court construing Section 1978. Significantly, each of them supports our submission that the provision does more than annul State laws which deny the Negro (or other non-white citizens) capacity to buy or rent a home.

The first direct application of Section 1978 to reach this Court was *Buchanan* v. *Warley, supra,* decided here in 1917. It was there expressly held that "the Fourteenth Amendment and these statutes [Section 1977 and 1978]" (245 U.S. at 79) invali-

dated a local ordinance which did not generally disable Negroes from buying or renting real estate within the city, but merely forbade either race to occupy a dwelling in a block where the other race predominated. That ruling was followed in two subsequent decisions involving comparable ordinances. *Harmon* v. *Tyler,* 273 U.S. 668; *Richmond* v. *Deans,* 281 U.S. 704. While the *per curiam* disposition of those cases did not afford occasion to invoke Section 1978 expressly, it is fair to suppose that the citation of *Buchanan* v. *Warley* as authority endorses the holding that the statute, as well as the Constitution, barred the discrimination.

At all events, the *Buchanan* ruling that Section 1978 reaches a discriminatory fencing out of Negroes from certain blocks, otherwise legally eligible to buy or rent a home in the area, is confirmed by the unanimous opinion in *Shelley* v. *Kraemer, supra,* where the Court treats the statute (which is fully quoted) and the Fourteenth Amendment as co-extensive in this respect. 334 U.S. at 10–12. Indeed, after setting forth the cases just cited, the Court is at pains to emphasize that they recognize not only the federal right of a white seller to sell or lease to Negroes notwithstanding local law restrictions but also the right of "those desiring to acquire and occupy property and barred on grounds of race or color." *Id.* at 12. See, also, *Barrows* v. *Jackson,* 346 U.S. 249, 254–255, 258–260.

These decisions, we submit, support our construction of Section 1978 as voiding measures which, without wholly denying the right of Negroes to purchase or lease real estate, substantially abridge the exercise

of that right by excluding the class from a particular area. We might also cite *Oyama* v. *California, supra,* which reads the statute broadly to condemn a State law severely handicapping the acquisition of real property by citizens of Japanese ancestry, although it recognized their right to acquire. But the dispositive holding on the point is *Hurd* v. *Hodge, supra.* In that case, the Court, expressly declining to decide the constitutional question presented (334 U.S. at 30), rested its decision, at least alternatively, on Section 1978. *Id.* at 30–34). The ruling was that the statute barred judicial enforcement of racially restrictive covenants with respect to certain city lots because that action—which would have nullified their contracts and compelled their eviction from the premises—denied the Negro purchasers "the same right 'as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property.' " *Id.* at 33–34.[14] Since only two-thirds of the lots in a single block in the District of Columbia were covered by the covenants in suit (*id.* at 26), it could not be clearer that the Court there construed Section 1978 as reaching any substantial exclusion from housing on racial

[14] We do not read the opinion dismissing reliance on Section 1978 in *Corrigan* v. *Buckley*, 271 U.S. 323, 330–331, to the contrary. That decision, as explained in *Shelley* v. *Kraemer*, *supra*, 334 U.S. at 8–9, 13, and *Hurd* v. *Hodge*, *supra*, 334 U.S. at 28–29, 31, merely held that a racially restrictive covenant of itself did not offend federal law. But see, *infra*, pp. 38 *et seq.* At all events, of course, those later decisions supersede any implication in *Corrigan* that Section 1978 is concerned only with general legal capacity to acquire and lease real property.

grounds—including, of course, the far more significant fencing-out involved in the present case.

Our previous discussion shows that ruling to be entirely faithful to the text of the statute and its legislative history. It remains, however, to show that Section 1978 annuls measures which have such an effect, although not in the shape of laws or official acts. The decisions invoked here do not go so far. Indeed, there is language to the contrary in some of the opinions. *E.g., Hurd* v. *Hodge, supra,* 334 U.S. at 31. We now address ourselves to that separate question.

B. SECTION 1978 REACHES CONDUCT NOT TAKEN "UNDER COLOR OF LAW"

Before proceeding further, it may be well, once again, to stress the limited reach of our argument. Our concern is entirely with wholesale discriminations which have the practical effect of wholly excluding a racial class from a substantial area. As we have already noted, that result was once commonly accomplished by law. But the same "fencing out" can be achieved by concerted private action, or even, in rare cases, by the act of a single large landowner. That is, of course, a more acute problem today, residential segregation ordinances and judicial enforcement of restrictive covenants having been condemned. Yet, the potentiality always existed and we submit this alternative means to the same end is equally forbidden by Section 1978.

1. Nothing in the text or context of the statute confines its reach to State action

We begin with the text of the statute:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Nothing in this language suggests that Section 1978 reaches only laws, or official acts, or conduct taken "under color of law." On their face, the words plainly cover any conduct which prevents Negroes and other non-whites from enjoying an equal opportunity to rent or purchase a home.

Certainly, nothing to the contrary is to be inferred from the description of the guarantee as a "right." We have already shown that "right" in this context cannot be read to mean only "legal capacity." Nor does the choice of that term of itself imply that only an immunity from hostile State action is conferred. In the usage of the time, "rights," whether viewed as created or merely "secured" by law, did not run against the sovereign alone. And that remains true today. One need only consult the public accommodation laws of 1875 and 1964, which control only private action: the first is entitled "An act to protect all citizens in their civil and legal rights" (18 Stat. 335); the second, the "Civil Rights Act of 1964" (Pub. L. 88–352, § 1, 78 Stat. 241). And see the Court's opinion in *United States* v. *Guest, supra,* 383 U.S. at 757–760, which repeatedly refers to the constitutional "right" to travel from one State to another, good against both official and private interference.

If it were not for contrary intimations in opinions of this Court, and perhaps one holding, there might be no occasion to go beyond the words of the statute to assert that, in an appropriate case, it reaches private conduct—assuming, as we later show (*infra*, pp. 51–57), that there is no constitutional objection to so reading Section 1978. Under the circumstances, however, we shall briefly explore every possible objection to construing the provision as controlling action not taken "under color of law."

We consider first the reasons suggested by an aside of the opinion in the *Civil Rights Cases, supra*, 109 U.S. at 16–17, for confining Section 1978 to State action. Although that decision is not directly concerned with our provision and construes it only tentatively in a digression, the importance of the precedent justifies consideration.

a. The original text of 1866. The initial point made in the opinion is that the original text of 1866 ended with the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding," dropped in the Revised Statutes. 109 U.S. at 16. It is of course contrary to the established rule governing the interpretation of the Revised Statutes of 1874 to go behind a clear text to an earlier version of the law. See *United States* v. *Bowen*, 100 U.S. 508, 513; *Vietor* v. *Arthur*, 104 U.S. 498, 499–500; *Hamilton* v. *Rathbone*, 175 U.S. 414, 419–421; *Benson* v. *Henkel*, 198 U.S. 1, 13; and see *United States* v. *Mosley, supra*.[15] But, at all events, we submit that the quoted phrase in the

[15] See note 13, *supra*.

original provision lends no support to the argument that the design was only to reach State action.

Read as words of limitation, the reference to local laws would make our provision inoperative whenever the State acted by executive or judicial proceedings independently of any legislative directive or authorization. That is, of course, directly contrary to the ruling in *Hurd* v. *Hodge, supra,* which holds Section 1978 applicable to judicial enforcement of private covenants wholly unrelated to any legislative declaration. And such a construction of Section 1 of the Civil Rights Act of 1866 would hardly be consistent with the scope given to Section 2 (now 18 U.S.C. 242) in *Classic, Screws, Williams* and *Price,* all involving unauthorized conduct of public officials. Cf. *Monroe* v. *Pape, supra.* But the basic fact is that the phrase "any law, etc., to the contrary, notwithstanding" was inserted for emphasis, not by way of limitation.

Indeed, it seems obvious that the quoted words merely declare the supremacy of the federal statute over inconsistent local laws, if "any" there be. The formula is borrowed from the Supremacy Clause of the Constitution itself. See Art. VI, cl. 2. And it was a common clause in the declaratory provisions of Reconstruction legislation. See, *e.g.,* Enforcement Act of May 31, 1870, §§ 1, 16 (16 Stat. 140, 144); Act of February 28, 1871, §§ 5, 6, 19 (16 Stat. 433, 434, 435, 440).[16] To be sure, the reference to contrary State laws

[16] Another equivalent formulation is illustrated by another provision of § 16 of the Enforcement Act of 1870: "and any law

suggests their probable existence, present or future. But it hardly follows that the federal right created was meant to be ineffective if it encountered no hostile State action. Clearly, the compilers of the Revised Statutes were fully warranted in deleting these words as wholly superfluous in 1874 when the supremacy of federal statutes implementing the post-War Amendments was more clearly understood.[17]

b. The limited scope of Section 2 of the 1866 Act. At least superficially more telling for the contention that Section 1978 controls State action alone is a wholly different point made by the opinion in the *Civil Rights Cases*: that Section 2 of the 1866 Act, enforcing the first section from which our provision is derived, punishes only conduct taken "under color of law." 109 U.S. at 16–17. Presumably, the suggestion is that if Section 1 had meant to prohibit wholly private acts of discrimination, the sanctions of Section 2 would have been made applicable to such conduct. In our view, however, that reasoning is not compelling.

In the first place, symmetry is not the hallmark of Reconstruction legislation. In fact, almost every measure of the period juxtaposes provisions which bear only against officials with others which control private

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of any State in conflict with this provision is hereby declared null and void." See, also, the comparable clause in § 1 of the Peonage Abolition Act of March 2, 1867 (14 Stat. 546), preserved in the modern codification, 42 U.S.C. 1994.

[17] The same deletion was made in R.S. § 1977, whose antecedents are § 1 of the Civil Rights of 1866 and § 16 of the Enforcement Act of 1870. Somewhat inconsistently, the phrase is retained in R.S. § 2004, now 42 U.S.C. 1971(a)(1).

action.[18] That is sufficient reason to resist the temptation to construe one provision by the next, even in the same Act. But if that approach were followed here, it would seem to lead in the opposite direction. Indeed, why expressly limit the application of the penalty to deprivations "under color of law" if the right involved itself runs only against official action?

At all events, it would not be remarkable if the Congress of 1866 had deemed it appropriate to confine criminal sanctions to State officials, bound by oath and duty to support the supreme law, while allowing only civil remedies against ordinary citizens. Or it may have been thought unnecessary to impose federal penalties where there were no State laws condoning abridgment of the rights declared in Section 1 because, in that situation, it was assumed the State itself would punish the offender under local ordinances implementing the national law. See Cong. Globe, 39th Cong., 1st Sess., pp. 1758, 1785. Neither hypothesis

[18] Thus, while Sections 2 and 3 of the Enforcement Act of May 31, 1870 (16 Stat. 140) reached only officers, Section 4 (invalidated in *United States* v. *Reese*, 92 U.S. 214), Section 5 (invalidated in *James* v. *Bowman*, 190 U.S. 127), and Section 6 (now 18 U.S.C. 241), reached private conspiracies as well. So it is with the Ku Klux Act of April 20, 1871 (17 Stat. 13): Section 1 (now 42 U.S.C. 1983) reached only acts done "under color" of State law, but Section 2 (the criminal portion of which was declared unconstitutional in *United States* v. *Harris*, 106 U.S. 629, and *Baldwin* v. *Franks*, 120 U.S. 678, the civil provision surviving as 42 U.S.C. 1985) encompassed private conspiracies. And the pattern is the same in the Act of March 1, 1875 (18 Stat. 335): Sections 1 and 2 (invalidated in the *Civil Rights Cases*, 109 U.S. 3) reached private action, while Section 4 (sustained in *Ex parte Virginia*, 100 U.S. 339, now 18 U.S.C. 243) reached only officials.

suggests that the potential scope of Section 1 was restricted to acts "under color of law." [19]

No doubt, initially, the penal section of the Civil Rights Act of 1866 was viewed as the most important, for, as we have seen, the principal concern at first was to combat the Black Codes and to punish those who implemented them. But long before the text of Section 1978 became settled in the Revised Statutes of 1874, the focus had substantially changed and the broader scope of Section 1 took on new significance. These developments are relevant both because the reenactment of our provision in 1870 and 1874 justifies a con-

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[19] At one point during the debates on the Civil Rights Bill, Representative Loan inquired of the Chairman of the House Judiciary Committee (Wilson of Iowa), who seemed to be in charge of the measure, "why the committee limit the provisions of the second section to those who act under the color of law. Why not let them apply to the whole community where the acts are committed?" The following colloquy ensued (Cong. Globe, 39th Cong., 1st Sess., p. 1120):

> Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.
>
> Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizens?
>
> Mr. WILSON, of Iowa. We are not making a general criminal code for the States.
>
> Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?
>
> Mr. WILSON, of Iowa. A law without a sanction is of very little force.
>
> Mr. LOAN. Then why not put it in the bill directly?
>
> Mr. WILSON, of Iowa. That is what we are trying to do.

Nothing in this exchange suggests that the scope of Section 1 was equally narrow.

struction in light of then prevailing conditions and because other related legislation of these later years furnishes an authoritative indication of the original congressional intent.

It is sufficiently known that by 1870 one of the most serious threats to the rights of Negroes in the South was the Ku Klux Klan, and other comparable organizations, usually operating wholly outside the law and often against the constituted local authorities. See, *e.g.*, Stampp, *op. cit. supra,* at pp. 198–204. And, quite naturally, much of the congressional legislation of the time was aimed at these unofficial conspiracies. *E.g.*, §§ 4, 5 and 6 of the Enforcement Act of 1870, § 2 of the Ku Klux Klan Act of 1871, *supra* n. 18. This concern is evident in two of the surviving provisions of the Acts of 1870 and 1871, Section 241 of the Criminal Code and 42 U.S.C. 1985. See *United States* v. *Mosley, supra,* 238 U.S. at 387–388; *United States* v. *Price, supra,* 383 U.S. at 804–805; *Collins* v. *Hardyman, supra,* 341 U.S. at 662; and see *Monroe* v. *Pape, supra,* 365 U.S. at 174–176, 200, 257. Against this background, it would be difficult to interpret the reenactment of the first section of the Civil Rights Act of 1866 as confirming rights only against governmental invasion. In fact, the available evidence is clearly to the contrary.

Of particular interest is 18 U.S.C. 241, derived from Section 6 of the 1870 Act—Section 18 of which re-enacted our provision. The reach of that provision extends to wholly private conspiracies directed against a "citizen" in the exercise of "any right or privilege granted or secured to him by the Constitution or laws

of the United States." As the relevant legislative history makes clear, the focus was on the "rights and immunities of American citizenship" as announced by the Fourteenth and Fifteenth Amendments and implementing legislation. See Appendix to opinion of the Court in *United States* v. *Price, supra,* 383 U.S. at 807–820.[20] But, constitutional guarantees aside, what were the statutory rights and privileges of citizens intended to be protected? Except for voting rights—already vindicated by Sections 4 and 5 of the 1870 Act—the only apparent legislative declaration of citizenship rights in 1870 was Section 1 of the Civil Rights Act of 1866, now expanded and re-enacted.[21] Doubtless, one of the objects of the new law was to punish wholly private conspiracies directed against these rights, which, although good against all interference, had theretofore been protected by penal sanctions only from official invasion. That was of

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[20] The Court's Appendix in *Price* reproduces the whole of Senator Pool's speech on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870, which is characterized in the opinion as "the only statement explanatory of [18 U.S.C. 241] in the recorded congressional proceedings relative to its enactment" (383 U.S. at 805).

[21] As already noted, Section 18 of the Enforcement Act of May 31, 1870, re-enacted the whole of the Civil Rights Act of 1866. In addition, Section 16 of the 1870 Act reiterates the rights declared in 1866, except those relating to property, adding new guarantees and expanding the coverage to encompass not only citizens, but all persons, including aliens. Section 1977 of the Revised Statutes, 42 U.S.C. 1981, carries forward this expanded provision. See *Takahashi* v. *Fish Comm'n, supra,* 334 U.S. at 419.

course the necessary premise of the ruling in *United States* v. *Morris,* 125 Fed. 322 (E.D. Ark.), that 18 U.S.C. 241 (then R.S. § 5508) would punish a wholly private conspiracy of hostile whites seeking to prevent a Negro from exercising his right under Section 1978 to lease a farm in the area, and of Mr. Justice Bradley's *dictum* to the same effect in his opinion, on circuit, in *United States* v. *Cruikshank,* 1 Woods 308, 319, 25 Fed. Cas. 707, 712.[22] Thus, it is apparent that the Congress of 1870—presumptively faithful to the original understanding—viewed the rights declared in 1866 and later codified in Section 1978 as something more than mere immunities from hostile State action.

[22] The fact that 18 U.S.C. 241 has not been invoked against a private conspiracy directed at the exercise of rights secured by Section 1978 since 1903 does not weaken our argument as to the congressional understanding of 1870 or 1866. Indeed, so far as we are aware, there has likewise been no prosecution under Section 241 for invasion of such rights by public officials, whether implementing a local racial zoning ordinance or acting on their own authority. One explanation is that the 1906 ruling in *Hodges* v. *United States*, 203 U.S. 1, dismissing an indictment under 18 U.S.C. 241 against private conspirators charged with invading rights secured by Section 1977, cast doubt on the constitutional validity of Section 1978 as Thirteenth Amendment legislation. As Fourteenth Amendment rights, the guarantees of Section 1978 were deemed beyond the scope of 18 U.S.C. 241 under *United States* v. *Williams*, 341 U.S. 70, until that decision was repudiated two Terms ago in *United States* v. *Price*, *supra*. And, at all events, until *United States* v. *Guest*, *supra*, the characterization of Section 1978 as Fourteenth Amendment legislation was thought to confine its reach to conduct taken "under color of law", pursuant to the doctrine of the *Civil Rights Cases*, *supra*.

2. The constitutional doctrines of the Reconstruction period would not have inhibited the attempt to reach wholly private action

It remains only to inquire whether constitutional limitations oppose a construction of the statute that would make it effective against wholly private action. There are two aspects to the question: the first is whether the constitutional doctrines prevailing in the Congresses of 1866, 1870 and 1874, which originally enacted or re-enacted our provision, were such as to preclude them from attempting to reach private conduct in this area; the second is whether there are, in fact, constitutional obstacles to so reading Section 1978—whatever the views entertained in the Reconstruction period.

There is no basis for supposing that constitutional doubts inhibited congressional efforts to reach private action against Negro property rights during the Reconstruction decade. Of course, when the Civil Rights Act of 1866 was passed, the "State action" theory, premised on the language of the Fourteenth Amendment, not yet framed, had not been developed. There were, to be sure, some who doubted whether the Civil Rights Act was fully authorized by the Thirteenth Amendment, which was repeatedly invoked as the principal source of congressional power to enact the measure. But those objections—held by only a minority—had nothing to do with our problem. No one suggested that Thirteenth Amendment legislation could not constitutionally reach private action. On the contrary, the very next month, the Thirty-Ninth Congress passed a statute against kidnapping with a view

to enslavement which plainly governed wholly private conduct (Act of May 21, 1866, 14 Stat. 50, now 18 U.S.C. 1583), and, at the following session, it enacted the Anti-Peonage law with a comparable scope (Act of March 2, 1867, 14 Stat. 546, now 18 U.S.C. 1581 and 42 U.S.C. 1994). See *Clyatt* v. *United States,* 197 U.S. 207, 216–218. Nor has this Court ever questioned the proposition that laws implementing the Thirteenth Amendment may operate against individuals acting on their own authority. See *Slaughter-House Cases,* 16 Wall. 36, 78, 80; *Civil Rights Cases, supra,* 109 U.S. at 20, 23; *Clyatt* v. *United States, supra.*

Although the invocation of the Thirteenth Amendment is fully sufficient to show that the Congress of 1866 entertained no doubt of its power to reach private action by the first section of the Civil Rights Act, we advert to an additional reason supporting that conclusion. The debates on the measure confirm the indication of the text that Section 1 was viewed as declaring rights of American citizenship. See Cong. Globe, 39th Cong., 1st Sess., pp. 41, 474–475, 1119, 1294, 1757, 1835–1836. As such, these rights could of course be implemented by "primary and direct" legislation protecting them against all interference, public or private. See *Slaughter-House Cases, supra,* 16 Wall. at 78; *United States* v. *Guest, supra,* 383 U.S. at 757–760.[23] To be sure, one can debate the assump-

[23] Obviously, if Congress may punish a private conspiracy interfering with the exercise of rights and privileges of American citizenship, it may also declare them by positive law.

tion of 1866 that the right freely to acquire and hold property is a right of *national,* rather than State, citizenship (see *Slaughter-House Cases, supra,* 16 Wall. at 76–78). So, also, *Paul* v. *Virginia,* 8 Wall. 168, and later cases undermine the reliance of the 39th Congress on the Privileges and Immunities Clause of the original Constitution (Art. IV, § 2) as a source of power to define and secure federal citizenship rights. But see, Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 9 Wm. & M.L. Rev. 1. Right or wrong, however, it is enough that these views prevailed in the Congress of 1866 and that, under then settled authority (*Prigg* v. *Pennsylvania,* 16 Pet. 539, 615–620; *Kentucky* v. *Dennison,* 24 How. 66, 104–105), they authorized legislation protecting the rights involved against private interference.

So much for the Congress of 1866. But what of the Congress of 1870 which re-enacted our provision after the passage of the Fourteenth Amendment? Assuming it once reached further, was Section 1978 necessarily confined to State action when it became Fourteenth Amendment legislation? The point is quickly disposed of.

In the first place, there is no indication that a majority in either House doubted the constitutionality of the Civil Rights Act before the adoption of the Fourteenth Amendment. The later reenactment was for good measure, without repudiating anything done before. Nor is it to be supposed that the Congress of 1870, if it entertained doubts about its power to

reach private action under the Fourteenth Amendment, meant to forego other sources of power when it re-enacted the 1866 statute. But, as a matter of fact, it is clear that most of the legislators of 1870 saw no such difficulty. Other measures they enacted provide sufficient proof that they did not share the limited view of Section 5 of the Fourteenth Amendment later articulated in the *Civil Rights Cases*. Indeed, as already noted, the very Enforcement Act of 1870 which re-enacted the statute of 1866 contains at least three sections unquestionably embracing private conduct, including what is now 18 U.S.C. 241 and two provisions invalidated by this Court partly on that ground. See *United States* v. *Reese*, 92 U.S. 214 (holding unconstitutional § 4 of the Act); *James* v. *Bowman*, 190 U.S. 127 (§ 5). And, as subsequent enactments make plain, that view of congressional power to enforce the Fourteenth Amendment prevailed beyond the codification of Section 1978 in the Revised Statutes of 1874. See the Ku Klux Act of April 20, 1871, partly invalidated in *United States* v. *Harris*, 106 U.S. 629, and the Civil Rights Act of March 1, 1875, struck down in the *Civil Rights Cases*, *supra*.

3. No present constitutional barrier confines the reach of the statute to State action

We turn, finally, to the question whether Section 1978 would overstep constitutional boundaries, as presently understood, if it were construed to reach wholly private action. It is, of course, relevant that those who wrote the provision thought not. To be sure, that consideration is not dispositive, as the fate of much Re-

construction legislation in this Court, from the decision in *Reese* in 1875 to *Collins* v. *Hardyman* in 1951, attests. Yet, the opinion of the contemporary legislators remains relevant because they were also the framers of the Thirteenth, Fourteenth and Fifteenth Amendments and must be assumed to have known, and observed, the limitations there announced.[24] See Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 277. At all events, however, recent decisions of the Court make clear that there is no constitutional obstacle to our reading of Section 1978.

a. The congressional power to implement the Thirteenth Amendment. Before invoking the modern cases construing Section 5 of the Fourteenth Amendment as applied to the Equal Protection Clause, it is worth noting that this Court has never expressly disap-

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[24] Thus, 35 of the 50 Senators who were sitting when the proposition for the Thirteenth Amendment was approved were present when the Civil Rights Act of 1866 was passed (Biographical Directory of the American Congress, 1774–1961, pp. 178–181, 182–185), and all but three of these who had voted in favor of the Amendment likewise voted in favor of the implementing statute (Cong. Globe, 38th Cong., 1st Sess., p. 1490; Cong. Globe, 39th Cong., 1st Sess., pp. 606, 1809). So, also, all 15 Senators who had voted in favor of the Fourteenth Amendment in 1866 and who remained when the Enforcement Act of 1870 came before the Senate voted in favor of that measure (Cong. Globe, 39th Cong., 1st Sess., p. 3042; Cong. Globe, 41st Cong., 2d Sess., p. 3809). Equally relevant to the question of the power of Congress to reach private action is the fact that, of the 39 Senators who had supported the Fifteenth Amendment (worded, like the Fourteenth, as a negative injunction addressed to the States), 28 remained and all voted in favor of the 1870 Act, which also purported to enforce that Amendment against wholly private conduct (Cong. Globe, 40th Cong., 3d Sess., p. 1641; Cong. Globe, 41st Cong., 2d Sess., p. 3809).

proved the view of the Thirty-Ninth Congress that the provision which became Section 1978 was authorized as legislation implementing the Thirteenth Amendment and, also, as an exercise of the congressional power to define and vindicate the rights and privileges of national citizenship.

Although most of the lower courts, federal and State, which had considered the question, had upheld the Civil Rights Act of 1866 before the adoption of the Fourteenth Amendment,[25] the question received little attention after 1868. There is, however, some later judicial support for the view that the 1866 Act was valid Thirteenth Amendment legislation reaching private action. We have already adverted to the ruling in *United States* v. *Morris, supra,* and the opinion on circuit in *United States* v. *Cruikshank, supra.* We should also note the *dictum* by this Court in *United States* v. *Harris, supra,* 106 U.S. at 640. In *Hodges* v. *United States, supra,* it is true, this Court held that the right to contract for employment, claimed under Section 1977, could not constitutionally be protected from a private conspiracy because it was not sufficiently related to the Thirteenth Amendment.[26] But, even assuming the continuing vitality of that holding,

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[25] *United States* v. *Rhodes*, 27 Fed. Cas. 785 (No. 16,151); *In re Turner*, 24 Fed. Cas. 337 (No. 14,247); *Smith* v. *Moody*, 26 Ind. 299; *Hart* v. *Hoss & Elder*, 26 La. Ann. 90. Contra, *People* v. *Brady*, 40 Cal. 198 (compare *People* v. *Washington*, 36 Cal. 658; *Bowlin* v. *Commonwealth*, 65 Ky. 5).

[26] It is noteworthy, however, that the Court apparently construed Section 1977 as intending to reach private action. Else, there would have been no occasion to decide the constitutional question.

it does not necessarily follow that the right not to be wholly fenced out from a community, supported by Section 1978, is on the same footing. It is at least arguable that the right invoked in the present case is more fundamental, and that the discrimination outlawed is more obviously a vestige of slavery.

b. The congressional power to define the privileges and immunities of national citizenship. So, also, no authoritative ruling forecloses the argument that Congress may define rights of national citizenship and that Section 1978 is an appropriate exercise of this power. The dictum of the *Slaughter-House Cases, supra,* 16 Wall. at 76, apparently classifying "the right to acquire and possess property of every kind" as a privilege of State citizenship, does not resolve the issue, the Court having had no occasion there to consider the power of Congress to promote the right to a privilege of national citizenship.[27] So far as we are aware, the Court has never directly addressed itself to the question. But no reason appears why Congress may not, within proper bounds, legislate to give content to United States citizenship, whether by virtue of Section 5 and the Citizenship Clause of Section 1 of the Fourteenth Amendment (cf. *Katzenbach* v. *Morgan,* 384 U.S. 641), or by invoking the Necessary and Proper Clause (Art. I, § 8, Cl. 18) to implement the Privileges and Immunities Clause of Article IV

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[27] Four members of the Court apparently believed that result had been achieved by the Civil Rights Act of 1866. See the dissenting opinion of Mr. Justice Field, which Chief Justice Chase, and Justices Swayne and Bradley joined, 16 Wall. at 96–97.

of the original Constitution (if, as has been persuasively argued, Antieau, *op. cit. supra,* the latter provision deals with rights of national citizenship). Cf. *Prigg* v. *Pennsylvania, supra; Kentucky* v. *Dennison, supra.* Nor is there any ground here for confining Congress to combatting hostile State action.[28] Cf. *Slaughter-House Cases, supra,* 16 Wall. at 78; *Prigg* v. *Pennsylvania, supra; Kentucky* v. *Dennison, supra; United States* v. *Guest, supra,* 383 U.S. at 757–760; and see note 23, *supra.*

c. The congressional power to enforce the Equal Protection Clause. In our view, however, the clearest constitutional foundation for Section 1978, construed as reaching private action, is the Equal Protection Clause. To be sure, although it was not the view of the Reconstruction Congresses, the opinion was long held here that Congress could not enforce that Clause against wholly private action (*e.g., Civil Rights Cases, supra*). That was, no doubt, the ground of the ruling in *Corrigan* v. *Buckley,* 271 U.S. 323, 330–331, that Section 1978 did not reach private restrictive covenants. But, whatever the doctrine of another day, it is

[28] The Citizenship Clause of the Fourteenth Amendment, unlike the other provisions of Section 1, is not in terms addressed to the States or worded in the form of a prohibition; it is an absolute declaration, stated affirmatively: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." So, also, the Privileges and Immunities Clause of Article IV is not worded merely to guarantee immunity from hostile State action, but, rather, as a positive grant of right, good against all interefrence: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

now settled that Section 5 of the Fourteenth Amendment authorizes the Congress to implement the Equal Protection Clause by "appropriate legislation" which controls private conduct. See *United States* v. *Guest, supra,* 383 U.S. at 761–762 (concurring opinion of Mr. Justice Clark), 774–784 (separate opinion of Mr. Justice Brennan). That is not to say, of course, that the power is wholly unconfined: there must be some relation to the goals of the Equal Protection Clause, itself viewed as affording equality only in matters regulated by local law. But Congress has a broad discretion in determining what measures are appropriate to achieving the constitutional objective of equal treatment by the State. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 648–651, 653–656; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 326. It is enough if one can "perceive a basis" for the conclusion that the means selected would serve to promote equal protection. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 653, 656.

Judged by this standard, there can be no doubt that Section 1978, insofar as it bars any substantial fencing out even by wholly private action, is "appropriate legislation." Indeed, it is obvious that those excluded from a community will be deprived of whatever governmental benefits are enjoyed there—whether public schools, parks and recreational facilities, employment in State managed or financed activities, municipal services, or other financial aids provided for any purpose by government. Nor is it always true that equivalent public advantages will be available in the neighboring community to which the excluded class is al-

lowed entry. There is more than a colorable basis for the assumption that a fencing out on racial grounds often reserves for the residents of the area a more desirable neighborhood, favored with better schools, more spacious parks, more efficient services, better zoning, and more modern public facilities. And, at all events, it may be enough if Congress concludes that the practical and psychological handicap imposed by any massive housing segregation measure, even without official sanction, would carry over to disadvantage the victims in their relations with government. Certainly, there is here a sufficient basis to sustain barring wholesale private discrimination in housing as an incident to enforcing the mandate of equality before the law. See Cox, "Foreword: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, at 118, 119–121.

C. SECTION 1978 REACHES VOLUNTARY RACIAL DISCRIMINATION BY LANDOWNERS

One further objection requires brief consideration. It is the suggestion that Section 1978 prohibits only *outside* interference with a transaction between a willing seller and a willing buyer, and that, indeed, far from compelling an unwilling owner to sell or lease, the statute protects his right to refuse, even on purely racial grounds. See Mr. Justice Black, dissenting, in *Bell* v. *Maryland, supra,* 378 U.S. at 329–332. This reading, to be sure, does not absolutely confine the operation of the provision to official acts or measures taken pursuant to local law, since private individuals, acting on their own authority, may attempt to inter-

vene between a willing buyer and seller by threats or violence. But, under the suggested construction, Section 1978 would not reach a voluntary conspiracy among landowners wholly to exclude Negroes from the housing they control, no matter how large an area was involved.

This view, we respectfully submit, is at odds with the congressional objective in enacting the provision. Nor is the exclusive focus on the right to dispose consistent with the text, which expressly grants a "right to * * * inherit, purchase [and] lease." In practical effect, this approach converts a Negro's right to buy or rent a home free of racial discrimination into a white man's right to deal, or refuse to deal, with whom he pleases. Surely, it needs no demonstration at this late date that such a rule is altogether one-sided: only by blinking reality can one speak of the "equal" right of the Negro to sell or refuse to sell to a white man, as he chooses. Cf. *Brown* v. *Board of Education*, 347 U.S. 483. Certainly, the Reconstruction Congress was not concerned with any such problem. The conditions of the time—not entirely changed even today—precluded any consideration of the wholly academic question whether the Negro should be free to sell his house to a white man: the practical objective was to permit the new freedmen to buy or lease housing.

Nor was the focus of those who enacted Section 1978 on the right of the white citizen to sell or rent to a Negro, free of prohibitions ordained by law or even community pressures. The typical victim of discrimination during the Reconstruction decade was not the

willing white seller who was prevented by outside forces from dealing with the Negro. Indeed, although language in opinions of this Court suggests otherwise,[29] there is some doubt whether Section 1978 was meant to confer any rights on whites. On the face of the statute, the guarantee runs only to the newly declared citizens who are to have the "same right * * * as is enjoyed by white citizens." See *Barrows* v. *Jackson, supra,* 346 U.S. at 254. And, as we have seen, the text accurately translates the congressional objective to assure the Negro an equal opportunity to establish his home or his business whenever he chose.

At all events, nothing in the decisions of this Court under Section 1978 compels restricting its operation to the situation of willing parties. To be sure, that was the fact in the cases adjudicated here. But the rationale of the opinions does not seem to turn on that circumstance. One doubts, for instance, whether the result in *Shelley* v. *Kraemer* or *Hurd* v. *Hodge* would have been different if the restrictive covenant had been invoked by the seller defending against enforcement of a sales contract which he executed without knowing the buyer's race and now wished to treat as void. Certainly, it did not save the New Orleans ordi-

[29] See *Buchanan* v. *Warley, supra,* 245 U.S. at 81, speaking of "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color * * *." It is noteworthy, however, that in all the decisions here after *Harmon* v. *Tyler, supra,* the right to non-discrimination was invoked by, or on behalf of, non-whites. See *Richmond* v. *Deans, supra,* as explained in *Shelley* v. *Kraemer, supra,* 334 U.S. at 12; *Hurd* v. *Hodge, supra; Takahashi* v. *Fish Comm'n, supra; Barrows* v. *Jackson, supra.*

nance involved in *Harmon* v. *Tyler, supra,* that exclusion of Negroes could be waived upon the consent of a majority of the white residents of the area. See *Shelley* v. *Kraemer, supra,* 334 U.S. at 12.

Undoubtedly, a uniform rule of exclusion imposed by outside compulsion is often more effective in maintaining residential segregation. But, however rare the occurrence, the same result is equally offensive when achieved by the voluntary action of property owners. In 1866 there was probably no distinction to be drawn between the two situations because the white landowners—alone eligible to vote and holding all political power—simply passed a law excluding Negroes from the area. See, *e.g.,* Cong. Globe, 39th Cong., 1st Sess., pp. 1124, 1160.[30] Today that alternative is clearly foreclosed. We submit Section 1978 should not be read to condone the identical fencing out accomplished by other means.

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[30] While the references are to the right to contract for labor, the statement of Congressman Cook is revealing (at *id.* p. 1124):

> Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. They can pass a law that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold. * * *

On the other hand, it is noteworthy that Congressman Windom, speaking on the same subject, does not expressly advert to the enactment of a law in the following passage (*id.* at 1160):

> Planters combine together to compel them to work for such wages as their former masters may dictate, and deny them the privilege of hiring to any one without the consent of the master; and in order to make it impossible for them to seek employment elsewhere, the pass system is still enforced. * * *

CONCLUSION

For the reasons stated, the judgments below should be reversed and the case remanded for trial.

Respectfully submitted:

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JANUARY 1968.

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APPENDIX

Missouri Statutes on Organization of Municipalities and Subdivisions

71.340. Construction and repair of public roads etc.—annual appropriation

The mayor and city council of any city or the chairman and board of trustees of any incorporated town or village shall have the power to annually appropriate and pay out of the treasury of such city or incorporated town or village a sum of money, not to exceed ten per cent of the annual general revenue thereof, for the purpose of constructing, building, repairing, working, grading or macadamizing any public road, street and highway and any bridge thereon leading to and from such city or incorporated town or village; and such appropriation shall be made by ordinance and the money so appropriated shall be applied under the supervision and direction of the engineers of such city or incorporated town or village, and of the county highway engineer of the county in which such city, town or village is located, or of some competent person selected by such city, town or village and approved by the county highway engineer, who shall make a report thereof, in writing, to the mayor and city council of such city, or to the chairman and board of trustees of such incorporated town or village; but this privilege shall not extend to a greater distance than five miles from the corporate limits of such city, town or village, and shall not be construed so as to allow any obstruction to or inter-

ference with the free use of any such public road, street or highway by the public, except so far as may be necessary while such work is being done, and further shall not be construed to affect the liability of such city, town or village, which liability shall be the same as if such roads, streets and highways were inside the city limits.

71.370. Contracts for fire protection between incorporated cities

Any incorporated city in this state having a fire department may contract to furnish fire protection to any other incorporated city or cities in this state, whether or not such other incorporated city or cities have a fire department.

71.380. Fire protection contracts.

Any two or more incorporated cities wishing to take advantage of sections 71.370 to 71.390, may, by ordinance duly enacted in each of such cities, agree upon the terms upon which such fire protection shall be furnished, and such agreement may, where two or more such cities have fire departments, include an interchange of the service of such fire departments upon such terms as is agreed upon; or such agreement may provide for the payment of a stated sum per month or per year, or a stated sum per fire, or any other method of compensation for such fire protection that is agreed upon by the two or more incorporated cities entering into such contract; provided, that any contract for a longer period than five years shall have no binding force until ratified by a majority of the qualified voters voting at an election called for that purpose in each of the cities entering into such contract.

72.040. Cities of fourth class.

All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class.

80.180. Trustees—powers as to sidewalks

Such board of trustees of any incorporated town or village in this state shall have power, by ordinance, to cause the owner or owners of any property or lot adjacent to any street or alley in said town or village to build, pave, construct, improve or repair any sidewalk along the side of said property or lot in such town or village.

80.260. Chairman of board—duties

The chairman of the board of trustees shall be a conservator of the peace, and shall have exclusive original jurisdiction to hear and determine all offenses against the ordinances of the town. He shall keep a docket in which he shall enter every cause commenced before him. He shall provide, at the expense of the town, a suitable room in which to hold his court, and his office shall be open every day, except Sunday, for the immediate trial, unless continued for good cause, of offenses against the ordinances of such town. He shall, at the expense of such town, procure a suitable docket, and shall transmit said docket and books and papers pertaining to his office, to his successor in office.

80.470. Additional levies—maximum rates

In addition to the levy aforesaid for general municipal purposes, all towns and villages in this state may levy annually not to exceed the following rates of taxa-

tion on all property subject to its taxing powers for the following special purposes: For library purposes in the manner and at the rate authorized under the provisions of sections 182.140 to 182.280, or amendments thereto; for hospital, public health and museum purposes, twenty cents on the one hundred dollars assessed valuation; and for recreation grounds in the manner and at the rate authorized under the provisions of sections 90.500 to 90.570.

80.480. Assessment and collection of revenues

All assessments on real and personal property within the limits of such town, which may be certified and transmitted to the board of trustees, from time to time, as provided in section 80.460, shall be taken and considered as the lawful and proper assessment on which to levy and collect the municipal taxes of the town, and the payment of all taxes authorized by this chapter shall be enforced by the collector in the same manner and under the same rules and regulations as may be provided by law for collecting and enforcing the payment of state and county taxes, and for that purpose it shall be the duty of the board of trustees to require the collector, annually, to make out and return, under oath, a list of delinquent taxes remaining due and uncollected on the first day of January of each year, to be known as the delinquent list. It shall be the duty of the board of trustees, at the next meeting after such delinquent list shall be returned, or as soon thereafter as convenient, carefully to examine the same, and if it shall appear that all property and taxes contained in said list are properly returned as delinquent, they shall approve such list and cause an order of approval to be entered on the journal, and the amount of taxes in such list to be credited on the account of the collector; and shall

also cause said delinquent list or a certified copy thereof, with the bills therefor, to be placed in the hands of the county collector, who shall give a receipt therefor and proceed to collect the taxes due thereon, in like manner and with the same effect as delinquent taxes for state and county purposes are collected. The said collector shall pay over the taxes collected to the city treasurer, at the times and in the manner provided by law for the payment of county taxes to the county treasurer, and shall make the same statements and settlements for such taxes with the board of trustees, and at the same time as may be provided by law for statements and settlements with the county court for county taxes, and all taxes shall bear the same rate of interest, and the same penalties shall attach to the nonpayment thereof when due, as may be provided by law in cases of county taxes. A certified copy of any tax bill included in the delinquent list, approved by the board of trustees, shall in all cases be prima facie evidence that the amount therein specified is legally due by the party against whom such tax bill is made out, and that all provisions of the law and ordinances have been duly complied with, and that the same is a lien on the property therein described.

80.490. Trustees—taxing powers

The board of trustees shall also, from time to time, provide, by ordinance, for the levy and collection of all other taxes and licenses, including poll taxes, wharfage and other dues, and to fix the penalties for neglect or refusal to pay same, which now or hereafter may be authorized by law or ordinance. All able-bodied male persons, between the age of twenty-one and fifty years, who may have resided within the corporate limits of such village thirty

days next preceding the levy of any poll tax for any given year, shall be liable to work on the streets and alleys of such village not to exceed three days, or to pay such sum in lieu thereof as may be provided by ordinance, not in any case, however, to exceed the sum of three dollars; and upon failure to pay such poll tax, either in cash or by labor, when notified so to do, according to law and the ordinance of such village, it shall be the duty of the town marshal, when ordered so to do by the board of trustees of such village, to bring suit before some magistrate, if there be any in such village, and if not, then before some magistrate nearest such village, and proceedings shall be had thereon the same as in other civil cases; and no property shall be exempt from seizure and sale upon any execution issued upon any judgment rendered for such poll tax.

89.030. Zoning districts

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of sections 89.010 to 89.140; and within such districts may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

89.040. Purpose of regulations

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentra-

tion of population; to preserve features of historical significance to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.

90.010. Parks—establishment, maintenance

Whenever any city desires to establish a park or pleasure grounds, the common council or mayor and board of alderman of such city is hereby authorized and empowered to acquire property for such purposes by gift, purchase or condemnation of lands in such city or within one mile thereof, and for that purpose may borrow money and issue bonds in payment thereof, and shall by ordinance describe the metes and bounds of such lands to be purchased or condemned. Lands owned by such city may by ordinance be converted, set aside or appropriated for parks or pleasure grounds. Such city may levy an annual tax not to exceed two mills on the dollar for the maintenance of such parks or pleasure grounds, and such tax shall be levied and collected in like manner with other general taxes of such city and shall be known as the park fund.

St. Louis County Ordinances

Chapter 1005 Subdivision Regulations

Section

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1005.010 Adoption of Regulations, Plans and Orders.—The existing Subdivision Regulations adopted January 19, 1943, the Order Establishing Building and Setback Lines Along Major Highways in the Unincorporated Area of St. Louis County, made and entered by the County Court at its May term 1943, the Major Highway Plan adopted December 8, 1942, as amended, and the Comprehensive Major Airport Plan adopted by the St. Louis County Planning Commission on April 23, 1943, together with all amendments thereof and all regulations and rules now in force pertaining thereto, are hereby declared to be in full force and effect in St. Louis County and are hereby approved and ratified. (O. No. 429, s.1)

1005.020 Purposes of Regulations.—In order to promote the health, safety, convenience and general welfare of the inhabitants of St. Louis County, and to guard against the creation of slums, blighted areas

or deficit districts by assisting in bringing about the co-ordinated, efficient and economical development of the unincorporated portion of the county the following regulations and minimum standards have been adopted by the St. Louis County Planning Commission.

General: It is suggested that each subdivider of land confer with the Commission, its Committee on Highways and Subdivisions or its staff, before preparing the preliminary plan, in order to become thoroughly familiar with subdivision requirements and with the proposals of the official master plan affecting the territory in which the proposed subdivision lies.

1005.030. Definitions.—1. For the purpose of these regulations, a subdivision of land is: (1) The division of land into two or more tracts, sites or parcels of three acres or less in area; (2) the division of land into tracks of more than three acres where the proposed lot frontage is less than 300 feet; (3) dedication or establishment of a road, highway or street through a tract of land regardless of area, and (4) resubdivisions of land heretofore divided or platted into lots, sites, or parcels, containing one acre or more or a total area of one acre or more.

(Note: Any sale or contract of sale or agreement to purchase any lot or division of land either by lot description or by metes and bounds as defined in the preceding portion of this section shall constitute a subdivision of land and require, prior to any sale or contract of sale or agreement to purchase and before the delivery of a deed the submission of a plat to the Commissioner as required by law; provided, however, that this shall not apply to land in subdivisions previously recorded, to sales of land used or to be used for orchards, forestry or the raising of crops, upon

certification by the Commission or to the sale or exchange of small parcels of land to or between adjoining property owners, where such sale or exchange does not create additional lots, or upon certification which must be granted by the Commission.)

2. Major Highway—A highway shown on the Major Highway Plan adopted by the Commission on December 8th, 1942, or a revision thereof.

3. Superhighway—A Highway shown on the Major Highway Plan adopted by the Commission on December 8th, 1942, or any revision thereof, which highway has an existing or proposed width of one-hundred-and-sixty feet or more.

4. Parkway—A route intended to be used primarily by passenger vehicles which may have a varying width of right-of-way and which right-of-way is or is intended to be developed with a park-like character.

5. Whenever the word "Commission" is used in these rules and regulations, it shall be deemed to refer to the County Planning Commission of St. Louis County, Missouri.

1005.040 Approval of Subdivision Plats.—Every subdivision of land within the unincorporated area of St. Louis County shall be shown upon a plat and submitted to the Commission for approval or disapproval. Any plat which has been approved by the Commission and its approval endorsed therein in writing shall be submitted to the County Court for its consideration, approval or disapproval. If the Commission does not approve the plat or if the legislative body or an incorporated area files a written protest with either the Commission or the County Council against any plat within one-and-one-half miles of its border it may then be approved by the County Council only in accordance with the provisions of Section 64.070, RSMo. 1949. No

plat shall be recorded in the office of the Recorder of Deeds and no lots shall be sold from such plat unless and until approved as hereinabove provided. Upon written request of the legislative body of any incorporated area in which there is no municipal planning commission, the Commission will pass upon subdivision plats within said incorporated area, and such plats shall be subject to all the appropriate provisions of these regulations.

1005.050 Preliminary Plan.—1. In seeking to subdivide land into building lots, or to dedicate streets, alleys, or land for public use, or to subdivide land into building lots, together with the dedication or reservation of public or private streets respectively, the owner shall submit seven black-and-white copies of the preliminary sketch plan to the Commission before submission of the final plan. Plats containing three lots or less may be exempted from the provisions of this section. The preliminary plan is to be drawn to a scale of 100 feet to the inch, but if the subdivision contains more than 160 acres the plan may be at a scale of 200 feet to the inch, and shall show:

(1) The location of present property, section, U.S. Survey and congressional township lines and lines of incorporated areas, sewer districts, public water supply and drainage districts, school districts and other legally established districts, streets, buildings, water courses, tree masses and other existing features within the area to be subdivided and similar facts regarding existing conditions on land immediately adjacent thereto.

(2) The proposed location and width of streets, alleys, lots, building and set-back lines and easements.

(3) Existing sanitary and storm sewers, water mains, culverts and other underground structures

within the tract or immediately adjacent thereto. The location and size of the nearest water main and sewer or outlet are to be indicated in a general way upon the plat.

(4) The title under which the proposed subdivision is to be recorded and the name of the subdivider platting the tract.

(5) The names and adjoining boundaries of all adjoining subdivisions and the names of record owners of adjoining parcels of unsubdivided land.

(6) Contours with intervals of five feet or less referred to sea level datum.

(7) North point, scale and date.

(8) Any zoning district or districts that affect the property to be subdivided.

(9) Grades and profiles of streets and plans or written and signed statements regarding the grades of proposed streets, and the width and type of pavement, location, size, type of sanitary sewers or other sewage disposal facilities, water mains and hydrants and other utilities; storm water drainage facilities and other proposed improvements, such as sidewalks, planting and parks, and any grading of individual lots.

2. Preliminary Plan. (1) Preliminary plans not containing all of the above data will not be approved by the County Planning Commission. Approval of the preliminary plan does not constitute an acceptance of the subdivision by the Commission. One copy of the approved preliminary plan, signed by the Chairman of the Commission, shall be retained in the office of the Commission. One signed copy to be given to the subdivider. Receipt of this signed copy is authorization for the subdivider to proceed with the preparation of plans and specifications for the minimum improve-

ments required in Section 1005.180 of these Rules and Regulations and with the preparation of the final plat. Prior to the construction of any improvements required in Section 1005.180 or to the submission of any bond, the subdivider shall furnish the commission all plans, information and data necessary for said improvements. These plans shall be examined by the Commission and will be approved if in accordance with the requirements of Section 1005.180 of these Rules and Regulations. Following this approval construction can be started or the amount of a bond determined. If the final plat conforms to the approved preliminary plat and if the necessary improvements are constructed in accordance with the approved plans therefor or a satisfactory bond or a satisfactory escrow agreement submitted assuring or guaranteeing their construction in accordance with the approved plans, the final plat will be approved by the Commission.

(2) The escrow agreement, hereinbefore provided, shall:

(a) be prepared or approved by the County Counselor;

(b) be executed by the Planning Director subject to the approval of the County Council;

(c) guarantee the improvements set forth in the approved preliminary plan by providing for a deposit with a qualified escrow depositary of that sum of lawful money of the United States of America with the Planning Director shall reasonably estimate as the cost of said improvements;

(d) provide that the escrowed sum shall be held in special escrow account by the escrow holder, subject to the audit of the Planning Director.

3. The escrowed sum shall be held by the escrow holder, as in the agreement provided, until such time as the Planning Director shall, by written authorization addressed to the escrow holder, release the escrow sum. The Planning Director shall release the escrow sum for disbursement by the escrow holder for the payment of labor and materials used in the construction and installation of the improvements guaranteed, as the work progresses and when approved by the Planning Director. In no case shall the Planning Director authorize the release nor shall the escrow holder release more than 70% of the escrow sum until said improvements and installations have been completed in a satisfactory manner in accordance with the Subdivision Regulations and approved by the St. Louis County Planning Commission. (O. No. 1447)

1005.060 Final Plat.—1. The final plat on tracing cloth and five black-and-white prints thereof together with copies of any deed restrictions where such are too lengthy to be shown on the plat, and three prints of certified plans showing the improvements that have been constructed within the subdivision (or a bond assuring construction of said improvements in accordance with plans previously approved) shall be submitted to the Commission. Before approving the plat of all or part of a proposed subdivision the Commission will require proof that the improvements and revisions thereof required in Section 1005.180 have been satisfactorily completed. The Commission shall act upon the final plat within thirty days after it has been submitted unless the subdivider agrees to an extension of this period. The approval of the Commission shall be shown on the plat with the date of such approval and over the signature of the Chairman of the Commission.

2. The final plat is to be drawn at a scale of 100 feet or less to the inch from an accurate survey and on one or more sheets whose maximum dimensions are 29 inches by 34 inches. In certain unusual instances where the subdivided area is of unusual size or shape, the Commission may permit a variation in the scale or size of the final plat. If more than two sheets are required, an index sheet of the same dimensions shall be filed showing the entire subdivision on one sheet together with all areas shown on other sheets.

3. The final plat shall show:

(1) The boundary lines of the area being subdivided with accurate distances and bearings; also all sections, U.S. Survey and congressional township lines and the boundary lines of incorporated areas, sewer, school and other legally established districts within or adjoining the subdivided area.

(2) The lines of all proposed streets and alleys with their width and names.

(3) The accurate outline of any property which is offered for dedication for public use.

(4) The line of departure of one street from another.

(5) The lines of all adjoining lands and the lines of adjacent streets and alleys with their width and names.

(6) All lot lines and an identification system for all lots and blocks.

(7) Building lines and easements for rights-of-way provided for public use, services or utilities with figures showing their dimensions.

(8) All dimensions, both linear and angular, necessary for locating boundaries of subdivisions, lots, streets, alleys, easements for building lines, and of any other areas for public or private use, the linear

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dimensions are to be expressed in feet and decimals of a foot.

(9) Radii, arcs and chords, points of tangency, central angles for all curvilinear streets, and radii for all rounded corners.

(10) All survey monuments and bench marks together with their descriptions.

(11) Name of subdivision and description of property subdivided, showing its location and extent, points of compass, scale of plan, and name of owner or owners or the subdivider.

(12) Certification by a reputable civil engineer or surveyor to the effect that the plan represents a survey made by him and that all the necessary survey monuments are correctly shown thereon.

(13) Private restrictions and trusteeships and their periods of existence. Should such restrictions and trusteeships be of such length as to make the lettering of same on plat impracticable and thus necessitate the preparation of a separate instrument, reference to such instrument shall be made on the plat. Plats shall contain proper acknowledgments of owners and the consent by the mortgagee to said plat and restrictions.

(14) Before it is recorded a certificate shall accompany the final plat, showing that all taxes payable shall have been previously paid in full.

1005.070 Acre Subdivision.—Whenever the area is divided into lots containing one or more acres and there are indications that such lots will eventually be resubdivided into smaller building plots, consideration must be given to the street and lot arrangement of the original subdivision so that additional minor streets can be opened which will permit of a logical arrangement of smaller lots.

1005.080 Relation to Adjoining Street System.—1. The arrangement of streets in new subdivisions shall make provision for the continuation of the principal existing streets in adjoining areas (or their proper projection where adjoining land is not subdivided) in so far as they may be deemed necessary by the Commission for public requirements. The width of such streets in new subdivisions shall not be less than the minimum street widths established herein. The street and alley arrangement must also be such as to cause no hardship to owners of adjoining property when they plat their own land and seek to provide for convenient access to it. In general, provisions should be made for through streets at intervals of approximately one-half mile or less. Offset streets should be avoided.

2. Streets that are obviously in alignment with others already existing and named shall bear the names of the existing streets. The proposed street names shall be checked against duplication of street names and approved by the Post Office Department.

1005.090 Streets in Relation to Railroads, Superhighways and Parkways.—When the area to be subdivided adjoins or contains, for a considerable distance, a railroad right-of-way, a superhighway or a parkway, a street should be dedicated approximately parallel to the side of such right-of-way and in determining the distance of such parallel street from the right-of-way of the railroad, superhighway or parkway, consideration should be given to the distance required for approach grades to future grade separations.

1005.100 Street and Alley Width.—1. The minimum width for major highways shall be the smallest width designated on the County Major Highway Plan,

as adopted by the Planning Commission on December 8, 1942 and ratified by Section 1005.010 SLCRO, and any subsequent amendments and additions thereto.

2. The minimum width for minor streets shall be fifty feet, except that in cases where the topography or special conditions make a street of less width more suitable, the Commission may waive the above requirements. When streets adjoin unsubdivided property a half-street not less, however, than thirty feet in width may be dedicated and whenever the subdivided property adjoins a half-street the remainder of the street shall be dedicated.

3. The minimum width of an alley in a residential block shall be fifteen feet, but such alleys are not recommended except under unusual conditions. Alleys will be required in the rear of all business lots and shall be at least twenty feet wide. A five-foot cut-off shall be made at all acute angle alley intersections. Adequate provision for off-street parking is to be made in connection with all platted business lots and in such other places where there may be such a concentration of vehicles that congestion of adjoining streets will result.

4. Where alleys are not provided, easements of not less than five feet in width shall be provided on each side of all rear lot lines, and along side lot lines where necessary, for poles, wires, conduits, storm and sanitary sewers, gas, water and heat mains. Easements of greater width may be required along or across lots where necessary for the extension of main storm and sanitary sewers and other utilities, and where both water and sewer lines are located in the same easement. (A. O. No. 2346)

1005.110 Blocks.—1. No block shall be longer than fifteen hundred feet between street lines. Blocks over

seven hundred and fifty feet in length shall have a cross-walk near the center of the block. The right-of-way for such walks shall not be less than ten feet in width.

2. In platting residential lots containing from six thousand square feet to fifteen thousand square feet, it is recommended that the depth of the block not exceed three hundred feet.

3. Where it is desirable to subdivide a tract of land, which because of its size or location, does not permit an allotment directly related to a normal street arrangement, there may be established one or more "Places". Such a place may be in the form of a court, a deadend street, or other arrangement; provided, however, that proper access shall be given to all lots from a dedicated place (street or court). If such a place is more than two hundred and fifty feet in length it shall terminate in an open space (preferably circular) having a minimum radius of fifty feet. Except in unusual instances no dead-end street or place shall exceed one thousand feet in length.

1005.120 Lots.

(a) All side lines of lots shall be at right angles to straight street lines, or radial to curved street lines unless a variation to this rule will give a better street and lot plan. Lots with double frontage should be avoided.

(b) Except as provided in Section 1005.130 and 1005.30 hereof, the average minimum width of residential lots shall be fifty (50) feet at the building line and a rectangular or irregular shaped lot that is to be used for residential purposes shall contain an area of not less than six thousand (6,000) square feet; provided, however, that where the lot area regulations of any zoning ordinance or order require a larger lot

area, then the requirement of such zoning ordinance or order shall govern.

(c) Where corner lots rear upon lots facing the side street, the corner lots shall have extra width sufficient to permit the establishment of front building lines on both the front and the side of the lots adjoining the streets. Extra width should be provided on all corner lots irrespective of whether they rear upon lots facing the side streets.

(d) Lots on major highway intersections and at all other acute angle intersections which, in the opinion of the Commission, are likely to be dangerous to traffic movement shall have a radius of twenty (20) feet at the street corner. On business lots a chord may be substituted for the circular arc. Where grade separation structures are proposed at the intersection of major highways, the lots and improvements in the subdivision shall be arranged so as to make adequate provision for such structures.

(e) Residential lots shall conform to the following minimum frontage requirements:

1. All lots containing an area of ten thousand (10,000) square feet or more but less than twelve thousand (12,000) square feet shall have a minimum frontage of seventy-five (75) feet.

2. All lots containing an area of twelve thousand (12,000) square feet or more but less than fifteen thousand (15,000) square feet shall have a minimum frontage of eighty (80) feet.

3. All lots containing an area of fifteen thousand (15,000) square feet or more but less than twenty thousand (20,000) square feet shall have a minimum frontage of ninety (90) feet. (O. No. 1179, s. 2).

1005.130. Exceptions in Neighborhood Unit Developments.—Whenever a subdivision is developed as a

modern neighborhood unit, wherein adequate park or playground area is provided, through traffic is adequately cared for and the majority of the minor streets are of the cul-de-sac type the Commission may vary the requirements of Sections 1005.100, 1005.110 and 1005.120 in order to allow the subdivider more freedom in the arrangements of the street and lots, but at the same time protect the convenience, health, welfare and safety of the probable future residents of the subdivision as well as the character of the surrounding property and the general welfare of the entire county. In no case, however, shall the average lot area per family requirement be less than is required in any zoning regulation applying to the property, or in the absence of any zoning regulations, the average lot area per family shall not be less than six thousand square feet for single family residences or less than four thousand square feet per family for lots upon which residences are to be erected for more than one family.

1005.140 Building Lines.—Building lines shall be shown on all plats of lots intended for residential use of any character, and on commercial or industrial lots immediately adjoining residential areas. Such building lines on lots adjacent to major highways shall not be less than the building and setback lines established by any order of the County Court or County Council. In all cases, building lines shall not be less than required by any zoning regulation applying to the property. Where the subdivided area is not under zoning control the subdivider shall establish building lines in accordance with the needs of each addition, but in no case shall such building lines be less than thirty feet from the right-of-way of the street or highway upon which the lot fronts, except where all the frontage on one side of the street between two intersecting streets is to

be used for commercial or industrial purposes the minimum building line shall not be less than twenty feet from the right-of-way lines of the streets adjoining said commercial or industrial area. Restrictions requiring buildings to be set back to such building lines shall either be shown on the plat or shall be contained in a separately recorded instrument and referred to on the plat. Restrictions shall also be made and either shown on or referred to on the plat, requiring all buildings used for residential purposes to be set back not less than five feet from the side lot lines, except on corner lots, and not less than twenty-five feet from rear lot lines.

1005.150 Character of Development.—The Commission shall confer with the subdivider regarding the type and character of development that will be permitted in the subdivision and may agree with the subdivider as to certain minimum restrictions to be placed upon the property to prevent the construction of substandard buildings, control and the type of structures, or the use of the lots which, unless so controlled, would clearly depreciate the character and value of the proposed subdivision and of adjoining property. Deed restrictions or covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future, provided, however, that such deed restrictions or covenants shall not contain reversionary clauses wherein any lot shall return to the subdivider because of a violation thereon of the terms of the restrictions or covenants. Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily main-

tained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities, for the proper and continuous maintenance and supervision of such facilities.

1005.160 Parks, School Sites, etc.—In subdividing property, consideration shall be given to suitable sites for schools, parks, playgrounds and other common areas for public use so as to conform to the recommendations of the Commission in its adopted master plan or portion thereof of the County. Any provision for schools, parks and playgrounds should be indicated on the preliminary plan in order that it may be determined when and in what manner such areas will be dedicated to or acquired by the appropriate taxing agency.

1005.170 Easements Along Streams.—Whenever any stream or important surface drainage course is located in an area that is being subdivided, the subdivider shall dedicate an adequate easement along each side of the stream, for the purpose of widening, deepening, sloping, improving or protecting the stream or for drainage, parkway or recreational use.

1005.180 Improvements.—Plans for improvements required in this section shall be prepared by an engineer, duly registered in accordanee with Chapter 327 RSMo. 1959. The improvements listed below in subdivisions (1), (2), (3), (4), (5), (6), and (7) of this section shall be installed prior to the approval of the final plat, which is prepared for recording purposes. In lieu of actual completion of such improvements, the subdivider may file with the Commission a surety bond to secure to the County the actual construction of such improvements in a manner satisfactory to the County Council and within a period

specified by the Commission, but such period shall not exceed two years. Such bond shall be in the amount and with surety and conditions satisfactory to the County Council and shall be accompanied by signed statements from the Commission that the amount of the bond is adequate to cover the cost of the improvements. The owner of the tract may prepare and secure tentative approval of a final subdivision plat of the entire area and may install the above improvements only in a portion of such area, but the improvements must be installed in any portion of the area for which a final plan is approved for recording, and the owner may sell or lease or offer for sale or lease lots only in the improved portion of said property; provided, however, that trunk sewers and sewage treatment plants be designed and built to serve the entire area or designed and built in such a manner that they can easily be expanded, or extended, as the case may be to serve the entire area.

(1) Permanent Markers: All subdivision boundary corners and the four corners of all street intersections shall be definitely marked with permanent monuments. A permanent marker shall be deemed to be concrete with a minimum dimension of four inches extending below the frost line or steel pipe firmly imbedded in concrete which extends below the frost line. Should conditions prohibit the placing of monuments on line, off-set marking will be permitted, provided, however, that exact off-set courses and distances are shown on the subdivision plat. A permanent bench mark shall be accessibly placed, the elevation of which shall be based on the City of St. Louis directrix, and accurately noted on the subdivision plat.

(2) Street Improvements: All streets shall be graded and the roadway improved by surfacing. Roadway surfacing shall be in accordance with the St.

Louis County standard specifications. The Zoning Enforcement Officer shall approve subdivisions with lots of 100 foot frontage when the developer installs paving with a width of 20 feet including a 16 foot bituminous macadam pavement with 2 foot concrete gutters on each side of the 16 foot bituminous macadam pavement, but sodded gutters shall not be considered after August 19, 1949 because of absence of specifications for said sodded gutters. All grading and surfacing shall be done under supervision of the County Highway Engineer and shall be subject to approval. The treatment of the intersection of any new street with a State highway shall be approved by the Division Highway Engineer.

(3) Sidewalks: (a) Sidewalks shall be required along both sides of all streets including major highways, collector streets and minor streets located in all residential zoning districts regardless of lot size, except that sidewalks shall not be required along controlled access highways. The requirements for sidewalks as herein provided may be waived by the Planning Commission on petition of the subdivider where not deemed essential for the public safety by the Planning Commission. (b) Sidewalks shall be constructed in accordance with the St. Louis County Standard Specifications. (O. No. 3419—Adopted 11/5/64)

(4) Water Lines: (a) Where an approved public water supply is reasonably accessible or procurable, the subdivider shall connect with such water supply and make it available for each lot within the subdivided area. Fire hydrants shall also be installed by the subdivider in accordance with the requirements of the Fire Underwriters when the subdivision lies in an area that is served by an established fire department. (b) Pending availability of a public water

supply, the subdivider shall construct wells or a private water supply system in such a manner that an adequate supply of potable water will be available to every lot within the subdivision. The information furnished and the approval of same shall comply with the requirements of the State Board of Health. The water supply system shall be constructed under supervision of the County Health Department and the plat shall not be recorded until the regulations of the State Board of Health are complied with.

(5) Sewers: (a) Where a public sanitary sewer is reasonably accessible, the subdivider shall connect with such sanitary sewer and provide adequate sewer lines accessible to each lot. Sewer connections and subdivision sewer systems shall comply with the regulations of the State Board of Health, and shall be constructed under the supervision of the County Health Department and shall be approved by said Department. (b) Where a public sanitary sewer is not reasonably accessible, but where plans for installation of sanitary sewers in the vicinity of the subdivision have been prepared and approved by the State Board of Health, the subdivider shall install sewers in conformity with such plans, although a connection to an existing main may not be immediately practicable. In such cases and until such connection is made with the sewer system of the district the use of a sewage treatment plant will be permitted, provided such disposal facilities are constructed in accordance with the regulations and requirements of the State Board of Health; constructed under the supervision of the County Health Department and approved by said Department. (c) Where no sewers are accessible and no plans for same have been prepared, the subdivider shall either install sewer lines and a disposal system in accordance with the require-

ments of the preceding paragraph, or if the subdivided lots have a minimum width of one hundred feet and contain an average area of twenty thousand square feet or more he may install individual sewage disposal devices for each lot, but all such individual disposal sewage systems shall be erected in accordance with the regulations and requirements of the State Board of Health, and under the supervision of and approved by the County Health Department and the County Board of Plumbing Supervisors. (d) Adequate provision shall be made for the disposal of storm water subject to the approval of the Commission.

(6) The subdivider should plant trees on all streets in new residential subdivisions that are not located in wooded areas. Before the trees are planted, the subdivider should submit a plan of such planting to the Commission for its study and recommendation, to prevent the planting of certain species that would become nuisances because of insects or disease or because of their roots unduly interfering with sewer mains or other underground utilities.

(7) Street signs bearing the name of the street as designated on the final plat shall be placed at all street intersections. The location and installation of such signs shall be done under the supervision of the County Highway Engineer. The size, height, and type of sign shall be in accordance with the specifications of the County Highway Engineer. (A. O. No. 2627)

1005.190 Inspection and Permits.—1. Periodical inspections by the Planning Commission staff shall be made of the subdivision areas during the planning stages and as construction progresses. The Highway Division of St. Louis County shall inspect all streets and improvements within the street right-of-way and all storm sewers outside the Metropolitan St. Louis Sewer District during the progress of construction.

In the case of private streets in a subdivision, the Highway Division shall make its inspections as aforesaid, as the official representative of the Planning Commission and shall promptly report all defects and substandard work or materials to the Commission. A registered professional engineer shall prepare specifications for each subdivision and the improvements therein, in accordance with the requirements of St. Louis County.

2. No land shall be subdivided or re-subdivided by plat or deed without securing a subdivision permit from the Planning Commission. The fees for subdivision permits shall be as follows:

1 to 3 parcels, tracts or lots (Total area of original tract as of January 19, 1943, 3 acres or less in area)	Exempt from fee.
1 to 3 parcels, tracts or lots (which are further subdivision of original tract with a total area as of January 19, 1943, of more than 3 acres)	$1.00 per lot.
4 to 10 parcels, tracts or lots	$10.00.
10 to 20 parcels, tracts or lots	$10.00 plus 1.00 per lot.
Over 20 parcels, tracts or lots	$25.00 plus 1.00 per lot.

No construction shall commence without first obtaining a subdivision construction permit from the Planning Commission and without first giving 48 hours notice of the work proposed to be done. The cost of such permit shall be 1% of the estimated cost of such improvements, including paving, and storm sewers and sanitary sewers and sewage disposal plants outside of the Metropolitan St. Louis Sewer District, and such other improvements as may be provided or required, and if the persons applying for such construction permits have paid the subdivision permit fees as above required the amount thereof shall be credited on the cost of the construction permit. Subdivision fees and construction fees hereunder shall be

accounted for by the Planning Commission at the end of each month.

3. The Planning Commission shall also collect at the time that the construction fees are paid, inspection fees for the account of the Highway Division at the rate of $4.00 per hour, or $32.00 per day, based upon the Highway Engineer's estimate of time required to inspect storm sewers and other drainage structures outside of the Metropolitan St. Louis Sewer District, and the streets, public or private, including paving. The Highway Division shall be entitled to full compensation for the time consumed in making such inspections. If the estimated fee is inadequate, the necessary additional fees shall be collected by the Planning Commission upon notice from the Highway Division, and if the estimated fee is in excess of the amount actually expended, the balance shall be refunded by the Highway Division. Claims for such refunds shall be made to the Highway Division and shall be paid when audited and approved by the Highway Engineer.

4. In addition to all fees provided for herein, the persons developing the subdivision shall pay for and arrange for inspections by the Plumbing Department and Health Department as may be required by other ordinances and regulations of St. Louis County.

5. The Planning Commission shall at the end of each month account for the inspection fees collected for the account of the Highway Division and shall pay the same into the Road and Bridge Fund of St. Louis County. (A. O. No. 3057)

1005.200 Variations and Exceptions.—Whenever the tract to be subdivided is of such unusual size or shape or is surrounded by such development or unusual conditions that the strict application of the

requirements contained in these Regulations would result in real difficulties and substantial hardships or injustices, the Commission may vary or modify such requirements, so that the subdivider is allowed to develop his property in a reasonable manner, but so, at the same time, the public welfare and interest of the County are protected and the general intent and spirit of these Regulations are preserved.

1005.210 Administration and Amendment.—The Commission may, from time to time, adopt, amend and publish rules and instructions for the administration of these Regulations to the end that the public be informed and that approval of plats be expedited. These regulations may be changed or amended by the Commission after public hearing, due notice of which shall be given as required by law.

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SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA [illegible] JONES,

Petitioners,

vs.

ALFRED H. MAYER COMPANY, a Corporation, ALFRED RAHER COMPANY, a Corporation, PARKWOOD COUNTRY CLUB, INC., a Corporation, ALFRED H. MAYER, an Individual, and an Officer of the Above Corporations,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE

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BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE.

INTEREST OF AMICUS CURIAE.

The Attorney General of the State of California is the chief law officer of the State of California,[1] and as such is concerned with establishing and maintaining a safe and orderly society for the citizens of that state. To this end, the Attorney General realizes that the problems which plague our society cannot be solved without eliminating the evils which create and cause these problems.

[1]California Constitution, Article, V, § 13.

Segregation and discrimination in housing has long been recognized as one of the major evils of our present day society.[2] From discrimination and segregation in housing arises the ghetto; from the ghetto, frustration, hopelessness, and despair,[3] and from these feelings, the anti-social attitude which breeds crime, disrespect for law and spontaneous violence.

The Attorney General of California feels that to minimize the lawlessness that pervades our cities, we must eradicate the evils of discrimination and segregation and eliminate from our society the restrictive ghettoes which plague our cities.

The instant case could not have arisen in California, where the legislature has enacted laws which prevent such admitted discrimination by subdevelopers.[4] But the presence of the legislation within her own state does not end California's concern. Housing discrimination is a nation-wide problem, and the attitudes which create ghettoes, as well as the attitude created by the ghetto, migrate with the nation's citizens as they move from state to state. Being the largest state in the union, with the largest number of immigrants, California[5] has a primary concern with the problem of housing discrimination.

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[2]*Jackson v. Pasadena*, 59 Cal. 2d 876 (1963).

[3]*Berman v. Parker*, 348 U.S. 26 (1954).

[4]Section 51 of Civil Code; § 35700 *et seq.*, Health and Safety Code.

[5]Every day brings new citizens to California from other sections of the nation. For the 5-year period from 1955 to 1960, 2,148,255 residents of other parts of the Union moved to this state. (U.S. Bureau of Census P.C. (2)-2B). During the year ending July 1, 1965, California's population showed an approximate net increase of 340,000 attributable solely to migration from within the United States. (Information supplied to our office by the Office of Population Studies, California Department of Finance).

If the lower court decision is permitted to stand, other developers will be able to create new ghettoes throughout the nation, thus aggravating an already serious national problem.

It is with these thoughts in mind that California files this amicus curiae brief on behalf of the petitioners, Joseph and Barbara Jones.

Introduction to Argument.

Amicus joins with petitioners and other amici who have urged this court to hold that sections 1981-1983 of Title 42 of the United States Code give rise to a cause of action against the respondents without the involvement of the state. However, amicus believes that the argument has been fully developed and would like to devote its brief to another aspect of this action which we think might be helpful to the court. If this court is of the opinion that state action must be present to state a cause of action against respondents, under sections 1981-1983 of Title 42 of the United States Code, amicus believes that such state action is present herein.

ARGUMENT.

I.

There Is State Action in This Case by Virtue of the Licenses Held by Respondents.

Under the expanding concept of state action, this court has on numerous occasions held a variety of activities or non-activities to be state action. *Mulkey v. Reitman,* 387 U.S. 369 (1967), (constitutional amendment permitting private discrimination); *Evans v. Newton,* 382 U.S. 296 (1966) (quasi abandonment of public park); *Lombard v. Louisiana,* 373 U.S. 1 (1963) (official encouragement of private discriminatory conduct); and *Burton v. Wilmington, Parking Authority,* 365 U.S. 715 (1961) (government tolerance of private discrimination in a public building).

In each of the above-cited cases, the actual act of discrimination was carried out by a private person who, without state aid, encouragement or involvement, would have been free to commit an act of racial discrimination.

See also:

Robinson v. Florida, 378 U.S. 153 (1964);

Anderson v. Martin, 375 U.S. 399 (1964);

Turner v. City of Memphis, 369 U.S. 350 (1962); and

Garner v. Louisiana, 368 U.S. 157 (1961).

In all of the above cases, however, the state had become so involved in the private conduct as to convert that private conduct to prohibited state conduct.

Here, respondents are licensed corporations doing business within the State of Missouri and we urge this

court to accept the view that the possession of those licenses is sufficient state involvement to invoke the prohibitions of the Fourteenth Amendment.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this court held that a lessee of a governmental agency could not discriminate in the course of its business because any lease between the government and a private person carried an implied covenant that the premises would be used in a non-discriminatory manner. This court in arriving at that result announced, at 725:

> "But no state may effectively abdicate its responsibility by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction the Authority and through it the state has not made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The state has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which on that account cannot be considered to have been so purely private as to fall without the scope of the Fourteenth Amendment."

See also:

Smith v. Holiday Inns of America, Inc., 336 F. 2d 630 (1964);

Hampton v. City of Jacksonville, 304 F. 2d 320 (1962);

Derrington v. Plummer, 240 F. 2d 922 (1957); and

Tate v. Dept. of Conservation, Virginia, 231 F. 2d 615 (1956).

No logical distinction exists between a citizen who leases a building from a governmental agency to be used as a commercial venture for his own profit and a citizen, who by virtue of a license granted by a governmental agency, conducts a particular type of business for which the license is granted. Each is limited in the conduct of its business: the lessee by the lease provisions and restrictions placed upon him by the government and the licensee by the rules and regulations that are attendant upon the holding of that license. It seems to us beyond argument to say that the state is involved in one activity and not the other, for only by virtue of that license can the individual do business within that particular state. His total business existence is dependent upon the license he secures from the state. The prestige of the state is behind his business. And any deviation from the rules and regulations of that state causes a revocation of the license to do business in the state.

In *Garner v. Louisiana*, 368 U.S. 157 (1961), Justice Douglas in his concurrence could find no logical distinction between a lessee of public property and a licensee of a governmental agency when he said at 184-85:

> *"I do not believe that a state that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a state can constitutionally exercise its licensing power over businesses either in terms or in effect to segre-*

gate the races in the licensed premises. The authority to license a business for public use is derived from the public. . . . I see no way whereby licenses issued by a state to serve the public can be distinguished from leases of public facilities (*Burton v. Wilmington Parking Authority, supra*) for that end. One can close the doors of his home to anyone he desires. *But, one who operates an enterprise under a license from the government enjoys a privilege that derives from the people . . . But the necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race.* For there is an overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group. . . ." (Emphasis added.)

See also concurring opinions of Justice Douglas; *Mulkey v. Reitman,* 387 U.S. 369, 381 (1967); *Lombard v. Louisiana,* 373 U.S. 267, 276 (1963).

Given the grave crisis in the nation's urban centers, this country cannot tolerate the use of any form of governmental assistance which permits private discriminatory conduct. Respondents, being licensees and doing business pursuant to their licenses, cannot use the privilege granted by a license to practice racial discrimination.

The language of Justice Douglas in *Mulkey v. Reitman, supra,* at 385 is apropos:

"These licensees are designated to serve the public. These licenses are not restricted, and could not

be restricted, to effectuate a policy of segregation. That would be state action that is barred by the Fourteenth Amendment. There is no difference, as I see it, between a State authorizing a licensee to practice racial discrimination and a State, without any express authorization of that kind nevertheless launching and countenancing the operation of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the State is impliedly sanctioning what it may not do specifically.

". . . .

"Since the real estate brokerage business is one that can be and is state-regulated and since it is state-licensed, it must be dedicated, like the telephone companies and the carriers and the hotels and motels, to the requirements of service to all without discrimination—a standard that in its modern setting is conditioned by the demands of the Equal Protection Clause of the Fourteenth Amendment."

II.

Respondents, by Creating the Segregated Community of Paddock Woods, Have Engaged in State Action Resulting in Illegal Racial Zoning.

Judged by the opinions below, respondents' major defense to their discriminatory acts is the assertion that they are private property owners, and by this status shielded from constitutional restrictions against racial discrimination.

If respondents were individuals attempting to sell a single family home after years of personal occupancy

to another individual, perhaps their argument would be persuasive. But respondents, with one exception, are not individuals engaged in a rare, isolated sale; they are corporations[6] for which such sales are an economic necessity of life. Respondents are not selling a family homestead; they are selling empty lots and empty houses. And most importantly, respondents do not offer individual homes already a part of an established community, but instead offer 100 lots whose communal existence is largely dependent upon their interrelationship with each other.

Respondents have created a community. They have built streets, determined boundaries, established recreational facilities, and created an organization—The Board of Trustees—which will oversee the community's future. Indeed, they have even decreed the community's identity, since it was they that named the town Paddock Woods.

In short, respondents are no more entitled to the title of "individual property owner" than was the corporation which controlled Chickasaw, Alabama, the community which formed the background for *Marsh v. Alabama,* 326 U.S. 501 (1946). In *Marsh,* the respondents argued that since Chickasaw was privately owned and operated, it could be treated in the same manner as a private home, and consequently, the town's owners could prevent the dissemination of religious literature upon its streets. The Supreme Court disagreed.

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage,

[6]The one exception is Alfred H. Mayer who is listed as an officer of each of the corporations involved in the suit. Consequently, it appears that his liability will arise solely from the corporations' actions.

> opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.
>
> ". . . .
>
> "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication have remained free." *Marsh v. Alabama, supra,* at 506-07.

Chickasaw, of course, was a company town, where virtually all the governmental functions were subjected to the whims of the private corporation. Here, admittedly, fewer governmental functions are manifestly present. But we do not believe the sheer number of traditional governmental functions controls the *Marsh* decision.

"What is 'private' action and what is 'state' action is not always easy to determine." *Evans v. Newton,* 382 U.S. 296, 299 (1966); see also *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). One can find a "private" parallel to virtually every "public" function. Education is traditionally a state function, but it also can be private, and when private, open to restrictions based on race or religion. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). The same holds true for recreational facilities, *Evans v. Newton, supra; Watson v. Memphis,* 373 U.S. 526 (1959); *Hampton v. City of Jacksonville,* 304 F. 2d 320; or public versus private trusts, *Pennsylvania v. Board of Trustees,* 353 U.S. 230 (1957).

Given the difficulty of labeling functions "private" or "public", what seems critical is the nature of the functions involved, the "predominant character and purpose" (*Evans v. Newton, supra,* at 502) of those functions, and the degree to which the control of the functions by an ostensibly private group affects men's lives. At some point, no matter how a private entity chooses to define its role, it will assume too many functions, or functions of too critical a nature, to permit it to remain classified as "private" and retain the freedom from constitutional responsibility that term implies. As stated by Justice Douglas in *Evans v. Newton,* at 299:

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state actions."

Evans related to a private city park, but the reasoning behind the decision has also been applied in *Terry v. Adams,* 345 U.S. 461 (1953), where the conduct involved was private control of the vote; in *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 (1952), which involved a public utility transportation system in Washington, D.C.; and, of course, in *Marsh, supra,* where the issue was free access to the streets of a company town.

The logic seems equally applicable here. When a private corporation creates a closely-knit community, and by its decisions can control the destinies of 100 families now, and ultimately the destiny of 1000, it ceases to operate in an exclusively private domain. In building a community of this magnitude, the private

subdeveloper engages in conduct equally as "impregnated with a governmental function" as any activity in *Evans, Terry, Public Utilities Commission,* or *Marsh* —the "state and municipal function" of zoning. *Euclid v. Ambler Co.,* 272 U.S. 365, 389 (1926), *et seq.; Berman v. Parker,* 348 U.S. 26, 34-35 (1954).

Obviously, no municipality could establish racial restrictions as part of a zoning ordinance. *Buchanan v. Warley,* 245 U.S. 60, 79 (1917); *Harmon v., Tyler,* 273 U.S. 668 (1927). And as Justice Douglas noted in his concurring opinion in *Mulkey v. Reitman,* 387 U.S. 369 (1967) at 384:

> "When the State leaves that function [zoning] to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act. . . ."

We do not believe the proprietors of Chickasaw, Alabama, could, by corporate fiat, have prevented Negroes from living within the city's boundaries solely because of their race, for the right to acquire property free from racial discrimination is just as fundamental as the rights of free speech, religion, press, and assembly. *Shelley v. Kramer,* 334 U.S. 1, 10 (1948). Indeed as *Shelley* stated, at 10:

> "Equality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an *essential pre-condition* to the realization of other civil rights and liberties which the Amendment was intended to guarantee. . . ." (Emphasis added.)

Paddock Woods seems no different. One thousand people will gain this "essential pre-condition" to civil liberties when they become part of the community, and respondents cannot withhold this right from petitioners simply because they disapprove of Mr. Jones' race. Their permit them to retain the private luxury of prejudice conduct has become too imbued with public meaning to in their business dealings.

Conclusion.

For the reasons stated above, as well as the arguments enunciated in petitioners' opening brief, California urges that the judgment below be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 645.

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,
vs.
ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,
Respondents.

ON WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth District.

MOTION OF AMICUS CURIAE
Missouri Commissinon on Human Rights for Special Leave to Present Oral Argument and Brief in Support Thereof.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 645.

JOSEPH LEE JONES, et ux,
Petitioners,

vs.

ALFRED H. MAYER COMPANY,
et al,
Respondents.

MOTION OF AMICUS CURIAE
Missouri Commission on Human Rights for Special Leave to Present Oral Argument.

Comes now the Missouri Commission on Human Rights, amicus curiae in the above captioned matter, by the Attorney General of the State of Missouri and moves the court to grant special leave to present oral argument in this cause for the following reasons; to wit:

1. The Missouri Commission on Human Rights is an official agency of the State of Missouri.

2. The Commission has duly filed a brief in this court pursuant to Rule 42.

3. This cause having arisen in the State of Missouri, involving Missouri laws and affecting Missouri citizens. The Missouri Commission has special interest in the matter.

4. The Commission believes that its argument will provide assistance to the court not otherwise available; to wit:

a. The Commission's argument, as more fully set out in its brief, asserts that the direct consequence and proximate effect of the discriminatory refusal to sell a house is to deprive petitioners of clearly recognized constitutional rights which per force of State and local laws are attached to residence.

b. The Commission's argument is different and distinct from any of the arguments submitted by the parties and, to our information, by the amicii in this cause. The arguments of petitioners and of the United States focus upon the right to purchase a house whereas the arguments of the Commission focus beyond the mere sale upon those rights and privileges which arise as the direct consequence of the transfer of realty.

c. The Commission believes that its argument strikes to the heart of the matter and places discrimination in the sale of housing in true perspective with the totality of community life. We urge that discrimination in the sale of housing strikes to the right to be a member of society itself.

WHEREFORE the Commission moves the court to grant it special leave to present oral argument.

BRIEF IN SUPPORT OF MOTION.

This Motion is made pursuant to Paragraph 7 of Rule 44 of this Court.

The Missouri Commission on Human Rights is the official agency of the State of Missouri established to encourage fair treatment of all groups, Chapter 213, RSMo 1959. The

Commission is charged with the responsibility of enforcing the Fair Employment Practices Act, Chapter 296, RSMo Supp. 1967, and the Public Accommodations Act, Chapter 314, RSMo Supp. 1967. Missouri does not have statewide legislation prohibiting discriminatory practices in housing.

The Commission has duly filed a brief in this court pursuant to Rule 42.

The Commission believes that its argument will provide assistance to the court not otherwise available.

The Commission's argument, as more fully set out in its brief, asserts that the direct consequence and proximate effect of the discriminatory refusal to sell a house is to deprive petitioners of clearly recognized constitutional rights which per force of State and local laws are attached to residence.

Many civil rights run with the land. They can be exercised in actuality only where one lives. For example, in order to attend free the local public school, one must be a resident of the school district.

Respondents and other suburban developers—for personal or profit motives—desire to exclude Negroes from the communities which they develop. Their concern is not primarily with Negroes owning houses but with Negro presence and involvement in the community in its many facets: schools, parks, recreation, libraries, health services, etc. Respondents are able to achieve their ends with the assistance of legal residence requirements. For example, if no residence requirement applied to free public education, land developers would be unable to exclude minority groups from the schools within the community which they are developing.

Because respondents' discriminatory purposes can only be achieved with the assistance and by the joinder of state action, their conduct comes within the scope of the Four-

teeth Amendment and they cannot act so as to deprive persons of fundamental human rights solely on the grounds of their race.

The Commission's argument is different and distinct from any of the arguments submitted by the parties and, to our information, by the amicii in this cause. The arguments of petitioners and of the United States focus upon the right to purchase a house without discrimination whereas the arguments of the Commission focus upon those rights and privileges which arise as the direct consequence of the transfer of realty.

The Commission believes that its argument strikes to the heart of the matter and places discrimination in the sale of housing in true perspective with the totality of community life. We urge that discrimination in the sale of housing strikes to the right to be a member of society itself.

Therefore the Missouri Commission on Human Rights respectfully submits that the court should grant it special leave to present oral argument.

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PROOF OF SERVICE.

I, C. B. Burns, Jr., Assistant Attorney General and member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Motion and Brief in Support were served by first-class mail, postage prepaid, this 19th day of February, 1968, upon the following:

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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No. 645.

IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, QUESTIONS PRESENTED, AND STATEMENT OF THE CASE.

Respondents have no objection to the petitioners' presentation of any of these matters except as follows:

1. As to the constitutional provisions claimed to be invalid, petitioners' argument does not indicate any

reliance on the Commerce clause of Article I, or clauses 1 and 3 of Article IV, and only faint reliance on Section 4 of Article IV, of the federal constitution.

2. Of the three "Questions Presented" the second should be eliminated because we do not contend that the Civil Rights Act of 1866 was not validly enacted, either under the Thirteenth Amendment or the Fourteenth, or both.

3. The assertion in the Statement of the Case that "the allegations therein [i. e., in the Complaint] show a multiple panoply of state action" is an improper conclusion on a principal issue in the case. Furthermore, the assertions in the last paragraph of the Statement that respondents' Subdivision is **now** under "restrictive covenants" and that a "Board of Trustees appointed by the developers, **in fact, has** the power to levy assessments," etc., are not accurate. Reference to the Complaint will show that the allegation as to these matters is that respondents "have prepared or shall prepare a deed" under which "certain restrictions" **will be** established, and an association **will be** formed, and a Board of Trustees **will be** granted the power to levy assessments, etc. (Pet. App. 11a).

SUMMARY OF ARGUMENT.

Petitioners base their case on some statutory law, particularly Section 1982 of 42 U. S. C., that has survived from a Civil Rights Act enacted in 1866, and, in the alternative, on the Fourteenth Amendment, particularly the "equal protection" clause.

The first raises a question of statutory construction. Do the words "same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property" mean "right" in the sense of **legal qualification** or **competence** to inherit, purchase, etc., or do they mean something more, i. e., the right to obtain redress against a person who acts in a racially discriminatory manner? In other words, do they impose a **duty** on an unwilling seller in addition to guaranteeing the purchaser's **legal right to buy**? Petitioners contend that the statute embraces the duty as well as the right.

To this the respondents' answer is threefold. First, the framers of the Act of 1866 had no such intention. They were concerned mainly with the **laws** in a number of the southern states which continued to retain restrictions on the property **rights** of Negroes. Though they were aware that private discrimination by individuals was also widely practiced (as, indeed, it was even in states outside the South), the Act of 1866, in so far as it referred to property rights, was aimed only at **laws**, not individual conduct. Second, the judicial interpretation given to the statute since its enactment confines its scope to this original purpose, which explains why the Act "has led a relatively quiet existence and, as applied to real estate, has shown few, if any signs of life."[1] Third, if construed as the

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[1] Joseph B. Robison, *The Possibility of a Frontal Assault on the State Action Concept*, 41 Notre Dame Lawyer 455, 463 (1966). Mr. Robison is one of the counsel on the *amici* brief filed in behalf of a group of national organizations headed by the National Committee Against Discrimination in Housing.

petitioners claim it should be, the Court will have to take on some difficult and non-judicial functions. One difficulty arises out of the breadth of the language of the statute. It covers all **personal** property as well as all types of real estate. The Court will therefore face the dilemma of holding that it means what it says, which obviously would create serious problems, or ignore its language and pick out certain kinds of real estate, e. g., subdivisions, large apartment projects, etc., which would create equally serious problems and in any event would involve the Court in what is essentially a legislative function. Finally, since the statute is silent as to its enforcement, the Court will be confronted with the task of "fashioning" an appropriate remedy. The complications of such a task, combined with the problem of definition of scope, confirm the impropriety of invoking this ancient statute as a basis for the relief here sought.

As for the Fourteenth Amendment, respondents argue, first, that it does not provide a basis for relief in this case because the facts here do not meet the "firmly established" requirement of **state action,**[1] in the sense that the state is "significantly involved" in the alleged discrimination, and second, that its application here will require the Court to exercise legislative functions under gravely inappropriate circumstances.

Since petitioners and several of the *amici* build their position of state involvement on a) the local laws and regulations licensing, governing, and making services available to, the respondents, and, b) the exercise by respondents of important governmental functions, our argument is aimed at showing the fallacy underlying each of these two claimed supports. With respect to the former, we will show that it would mean elimination of any requirement of state involvement, and has been judicially

[1] *Shelley v. Kraemer,* 334 U. S. 1, 13 (1948).

repudiated. With respect to the latter, we hope to demonstrate that petitioners' argument is meaningful only as to such property as is intended for "**use by the public in general,**"[1] that is, the streets and other public areas of a subdivision, and **not** to the lots being sold for **private use as residences.**

Our second argument against use of the Fourteenth Amendment raises the question of how the court can give the petitioners a suitable remedy, without assuming difficult and improper legislative functions. In this connection we will show that there is a fundamental difference between this case and all the cases cited by the petitioners and *amici*. In those cases, either the relief, whether for damages or injunction, was provided under what is now Section 1983 of Title 42 U. S. C., concededly inapplicable here because the wrongful conduct was not "under color of any statute" etc., **or** the holding of constitutional violation **automatically** gave the complainant the relief sought. In the present case relief is not sought under Section 1983, or under any other **remedial** statute. Petitioners have only "the bare terms" of the Amendment to rely upon. This means that a holding that respondents' conduct is unconstitutional will not automatically produce any relief unless the Court "fashions the remedy." To do this will require the Court to indulge in functions for which it is not properly suited. But more important than that, the task of creating such a remedy will mean that the Court has decided to venture into the "thicket" of national policymaking on a matter that is currently under consideration by Congress itself. As to this, we cannot offer a better summary of our position than in these historic words:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the

[1] *Marsh v. Alabama*, 326 U. S. 501, 506 (1946).

whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in **ordinary litigation between parties in personal actions** the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural.

ARGUMENT.

POINT I.

PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER SECTION 1982 OF TITLE 42 U. S. C. BECAUSE—

A. IT WOULD REQUIRE A CONSTRUCTION CONTRARY TO THE LEGISLATIVE INTENT AT THE TIME OF ITS ORIGINAL ENACTMENT;

B. SUCH A CONSTRUCTION WOULD BE CONTRARY TO ITS USE AND INTERPRETATION SINCE ITS ENACTMENT;

C. SUCH A CONSTRUCTION WILL REQUIRE THE COURT TO ASSUME DIFFICULT AND NON-JUDICIAL FUNCTIONS.

A.

IT WOULD REQUIRE A CONSTRUCTION CONTRARY TO THE LEGISLATIVE INTENT AT THE TIME OF ITS ORIGINAL ENACTMENT.

Section 1982 of Title 42 U. S. C. (referred to in the government's *amicus* brief as Section 1978 of the Revised Statutes) is rooted in the Civil Rights Act of 1866. Its very words, "All citizens of the United States[1] shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property," are identical with the words in the Act of 1866. We therefore agree that it is important to inquire what the 39th Congress intended when it adopted that Act.

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[1] In the original enactment the phrase was "all persons born in the United States." 14 Stat. 27.

Although the petitioners' brief deals only sketchily with the congressional intent at the time of the original enactment,[2] the briefs of the government and of the National Committee Against Discrimination in Housing, et al. (hereinafter referred to as the NCADH brief) discuss it in great detail. All three briefs claim that the historical evidence shows that Congress intended more than a prohibition against discriminatory laws, such as the notorious "Black Codes", which by their express language imposed property disqualifications and legal incapacities upon Negroes that were not imposed upon whites. Petitioners assert that in addition to such "direct action of state legislatures", Congress was aiming at "discriminatory conduct of individuals condoned by the silence of state legislatures."[1] The purpose of the bill, according to the NCADH brief, "was 'to break down all discrimination between black men and white men.' The debates make it clear that this aim was not limited to discrimination by state action."[3]

The government's brief goes even further. It asserts that "the real problem for the Congress in 1866 was *not* to nullify local statutes which wholly disabled the Negro with respect to property, or even to clarify his status on this score. . . . it was that many of the Southern States, while conceding the legal capacity of the Negro to hold all kinds of property and to engage in real estate transactions, severely limited the practical exercise of these rights".[4] "In sum", says the government, "the authors of the Civil Rights Act of 1866 were obviously well aware of the true legal status of the freedman in the

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[2] Pet. br. 12-16.

[1] id 13.

[3] NCADH br. 31.

[4] Govt. br. 30-31.

South and were concerned to combat *discrimination*, not *disabilities.*"[2]

The issue is thus boiled down to the question: Did the Congress that enacted the Act of 1866 intend that it be used to prohibit discrimination not only by laws, regulations, and other **governmental** action, but also by **private** or non-official conduct? To maintain the latter is, we submit, to ignore the evidence as to the conditions which led to the adoption of the Act, as well as the statements made in Congress at the time of its adoption.

We must first make it plain that we do not claim that the 39th Congress was not aware that, despite his emancipation, the Negro in the South was being subjected to widespread mistreatment by private individuals and unofficial groups.[1] It may fairly be urged, therefore, that Congress **could have intended** to legislate against all anti-Negro discrimination, private as well as governmental. The question is, however: **Did** it so intend? To prove that it did, the government cites the legislation of several of the recently rebellious states in support of its assertion that "it does not appear that any of the Black Codes denied the capacity of the Negro to acqnire and hold property, real or personal."[3] As its references indicate, counsel for the government are apparently relying on two reports dealing with legislation relating to Negroes in the South, prepared for the 39th Congress by the Secretary of State. (Sen. Ex. Doc. No. 6, 39th Congress, 2d Sess., and H. Ex. Doc. No. 118, 39th Congress, 1st Sess.) Unfortunately, the government's historical research seems to have gone amiss, apparently because of a failure to realize the difference between the resolutions adopted at the

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[2] id 33.

[1] J. tenBroek, *Equal Under Law*, 179-80 (Collier, 1965).

[3] Govt. br. [redacted].30.

state conventions called by the provisional governors appointed by the President, and the laws that were actually enacted by the state legislatures.

The states covered by the report in the House Executive Document which is dated May 22, 1866 are North Carolina, South Carolina, Georgia, Florida, Mississippi, Alabama, and Texas, in that order. As to North Carolina, the report says that at a "convention" held in October, 1865, a resolution was first adopted prohibiting slavery, and then on October 18, 1865, another resolution was adopted which "authorized the provisional governor to appoint a committee of three persons to prepare and report to the legislature at its next session, a system of laws—in order to conform the statutes of the state to the ordinance of the convention abolishing the institution of slavery."[1] Although this committee brought in a proposed bill for this purpose, the report pointedly observes that "The Department of State is not aware that the legislature of North Carolina has yet passed this or any similar bill."[2] Yet the government in its brief describes this **proposed** legislation as being in fact "the laws of North Carolina" when Congress was debating the Civil Rights Act.[3]

Worse still is the government's erroneous reference to the next state. "Even South Carolina", it says, "reportedly one of the two least generous States on this matter . . . expressly ordained in December 1865 that 'although [persons of color] are not entitled to social or political equality with white persons, they shall have the right to acquire, own and dispose of property.' "[4] Examination of the aforesaid House Executive Document, as well as the

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[1] H. Ex. Doc. No. 118, 39th Cong., 1st Sess., 1-2.

[2] id 2.

[3] Govt. br. 30.

[4] ibid.

Senate Executive Document, reveals that no such **legislation** was ordained in December 1865. What happened was the same as in North Carolina. A convention had met, and had adopted a resolution abolishing slavery and another resolution authorizing a commission to draft legislation to bring the state statutes into conformity with the anti-slavery resolution. As in North Carolina, a commission did bring in such proposed legislation and on December 19, 1865, the convention approved what was called "An Act Preliminary to Legislation Induced by the Emancipation of Slaves," and this Act did indeed include a provision giving "slaves" and "persons of color" the right to acquire and dispose of property. But as both the aforesaid Senate and the House Executive Documents clearly indicate, the state legislature did not adopt this proposed legislation until September 21, 1866,[1] **more than six months after the Civil Rights Act was passed the first time** (March 13, 1866), **and more than five months after it was passed** (April 9, 1966), **over President Johnson's veto.**

Passing by Georgia, for the moment, we find the Secretary of State's report on Florida showing that the legislature of that state had adopted a new code pertaining to Negroes. But, except for freeing Negroes from slavery, it did nothing but impose added restrictions and increase the penalties for their violation. Certainly nothing was done about granting or expanding the property rights of Negroes.[2]

As to Mississippi, the report indicates that the only loosening by law of the Negroes' property rights was to give them the same right to acquire and dispose of "personal property and choses in action by descent or purchase" as white persons had, but even this privilege was

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[1] See the aforesaid H. Ex Doc. No. 118, pp. 5-18, and Sen. Ex Doc. No. 6, pp. 219-220.

[2] Aforesaid H. Ex Doc. No. 118, 20-24.

not to be "so construed as to allow any freed man, free Negro or mulatto, to rent or lease any lands or tenements, except in unincorporated towns or cities."[1]

The situation in Alabama is reported as being similar to that in Florida, except that some legislation had been enacted legitimizing marriages between former slaves and granting a few limited civil rights such as the right to sue and to testify. No mention, whatever, of property rights of Negroes.[2]

Georgia and Texas are the only states described in the report as having legalized the right of Negroes to acquire and dispose of any kind of property. Georgia did this by statutory law enacted on March 17, 1866, **after** the first passage of the Act by Congress.[3] Texas did it on April 2, 1866, adding a very brief article to its constitution giving "Africans and their descendants . . . the right to acquire, hold, and transmit property."[4]

Such then was the situation reported to Congress even a month **after** it had enacted the Civil Rights Act. (The House Document, as has been said, is dated May 22, 1866). In at least four of the Southern States Negroes were still being prevented **by law**, i. e., they were **disqualified, legally disabled,** from acquiring or disposing of any kind of property. In another state they were disqualified **by law** from acquiring or disposing of any but

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[1] id 24-30.

[2] id 30-32.

[3] id 18-24. It is interesting to note that just fifteen days earlier Georgia's laws prohibiting "any Negro from buying or leasing a home" were called to the attention of Congress by Congressman Windom in his speech for adoption of the Civil Rights bill. Cong. Globe, 39th Cong., 1st Sess., H. p. 1160 (March 2, 1866). See also *infra*, p. 18.

[4] id 33.

personal property, and they could not even rent or lease any real estate except in incorporated towns or cities. To assert, therefore, as does the government, that the legislators who worked for the passage of the Civil Rights Act of 1866 were "concerned to combat *discrimination, not disabilities*" is to attribute to them either blindness or callousness to a condition that cried aloud for correction by congressional action.[3]

But not only is the government's assertion regarding the contemporary laws contradicted by the very documents on which it relies. We have in addition the overwhelming evidence of the debates themselves as recorded in the "Congressional Globe" and the statements of (a) the supporters of the Act, (b) the opponents of the Act, and (c) the explanation given by President Johnson for his veto of the Act. The writers of the government and the NCADH briefs would have the court believe that all three make it clear that "the aim was not limited to discrimination by state action"[1] and that all are "inconsistent with the view that the measure merely solemnized what no one contested, that the colored man was now legally competent to own and acquire property."[2] Let us look at the record.

(a) Statements of Supporters of the Act

In the Senate, its sponsor was Lyman Trumbull, of Illinois, Chairman of the Senate Judiciary Committee. In the House, it was James F. Wilson of Iowa, Chairman of the House Judiciary Committee. Here are some pertinent

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[3] We fail to understand why the government also includes a list of liberalizing laws enacted in some of the southern states **several years after** the Act of 1866 was enacted (br. 34).

[1] NCADH br. 31.

[2] Govt. br. 31.

passages from their speeches in Congress: (All emphasis added.)

Senator Trumbull, opening the debate in the Senate on January 27, 1966:

> It will have no operation in any State **where the laws are equal**, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave **code** and **all her laws** discriminating between persons on account of race or color shall be abolished.[1]

Senator Trumbull, speaking in favor of over-riding President Johnson's veto on April 4, 1866:

> These words "under color of law" were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted. **If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case**, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection.[2] . . .
>
> The bill neither confers nor abridges the rights of any one, but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment. Each State, so that it does not abridge the great fundamental rights belonging, under the

[1] Cong. Globe, 39th Cong., 1st Sess., S. p. 476.

[2] id S. p. 1758.

Constitution, to all citizens, may grant or withhold such civil rights as it pleases; **all that is required is that, in this respect, its laws shall be impartial.**[1]

Representative Wilson, opening the debate in the House on March 1, 1866:

It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. I am aware, sir, that this doctrine is denied in many of the States; but this only proves the necessity for the enactment of the remedial and protective features of this bill. **If the States would all observe the rights of our citizens, there would be no need of this bill.** . . .

It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on account of race, color, or previous condition of slavery. . . . **Laws** barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever.[2]

Representative Wilson, answering Representative Loan on the same day:

Mr. Speaker, I desire to ask the chairman who reported this bill, why the committee limit the provisions of the second section to those who act under the color of law. Why not let them apply to the whole community where the acts are committed?

Mr. Wilson of Iowa:

That grows out of the fact that **there is discrimination in reference to civil rights under the local laws**

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[1] id S. p. 1760.

[2] id H. pp. 1117, 1118.

of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.[1]

Chief of Trumbull's supporters in the Senate were Howard of Michigan and Lane of Indiana. Here is what they had to say:

Senator Howard on January 30, 1866:

What is a slave in contemplation of American law, in contemplation of the laws of all the slave States? . . . **He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent or inheritance.** . . . Is a free man to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home?[2]

Senator Lane on February 2, 1866:

What are the objects sought to be accomplished by this bill? That these freed men shall be secured in the possession of all the rights, privileges, and immunities of free men; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. **How else, I ask you, can we give them effect than by doing away with the slave codes of the respective States where slavery was lately tolerated?** . . . Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision. . . . We should not legislate at all if we believed the State courts could or would honestly carry out the provisions of the constitutional amendment; but because we believe

[1] id H. p. 1119.

[2] id S. p. 504.

they will not do that, we give the Federal officers jurisdiction.[1]

Wilson's principal supporters in the House were Cook of Illinois, Windom of Minnesota, and Thayer of Pennsylvania. Let us first see what Cook and Windom said, since both are quoted in the government's brief (60 fn).

Representative Cook, on March 1, 1866:

> What is the situation of affairs for which we are called to legislate for four million human beings who have been set free from chattel slavery . . . What do we see? In six States of the Union formerly in rebellion **laws have been passed** by the reconstructed Legislatures of those States which have been so malignant in their spirit toward these freed men, so subversive of their liberties, that the President of the United States and the commanders acting by his authority have set aside those **laws** and prevented their execution. General Thomas in Mississippi, General Swayne in Alabama, General Sickles in South Carolina, and General Terry in Virginia have issued positive **orders forbidding the execution of the laws which have passed the Legislatures of those States** against these black men. . . . The time when these men can be protected by the military power will cease. . . . Then the question is, shall we leave the men who have been loyal during this struggle, have fought on our side, and who have aided to carry the banner of the Republic in triumph through this terrible rebellion; **shall we leave them to the operation of laws** denounced as tyrannical by the military powers and as practically reducing these men to the condition of slavery? . . . **Take, for instance, the act that was passed in the State of South Carolina** and set aside by General Sickles. What is the condition

[1] id S. pp. 602-603.

of the freed man under that act? Is he secured in any right of freedom? Can any member here say that there is any probability, or any possibility, that these States will secure him in those rights? **They have already spoken through their Legislatures; we know what they will do; these acts, which have been set aside by the military commanders, are the expressions of their will. . . .**

To my mind the conclusion is irresistible that the second section of this amendment of the Constitution which gives us the right to enforce the article of the Constitution which provides against slavery or involuntary servitude, gives us the right to protect these men against precisely such a **system of legislation** as the one to which I have referred.[1]

Representative Windom, from whose speech on March 2, 1866 the government quotes a passage to show that he "does not expressly advert to the enactment of a law," not only reads excerpts from letters of military authorities in Mississippi quoting a specific section of that state's code prohibiting freed men from "the holding, leasing or renting of real estate," but goes on to refer to the laws of other states:

The State **laws** of Georgia and South Carolina, prohibit any Negro from buying or leasing a home. In North Carolina **the black code** of slavery is still in existence. In Virginia the **laws and customs** reduce the Negro to vagrancy, and then seize and sell him as a vagrant. . . .

These, sir are some specimens of protection which they get from the civil authorities of the States in which they live. They are denied a home in which to shelter their families, prohibited from carrying on any independent business, and then arrested and sold

[1] id H. pp. 1122-1123.

as vagrants because they have no homes and no business.[1]

Windom's concluding remarks are especially noteworthy because they demonstrate so incontestably that the real target of the bill was the **restrictive laws**, and not only those that were then in effect but also those that might later be enacted:

> Bear in mind the fact, too, that these wrongs are inflicted upon the freed men by communities and States while they are yet supposed to be on their good behavior for the purpose of regaining their old places of power in the Union. If such is the protection they now get **from the civil authorities of their own States**, what may we reasonably anticipate when those States again resume their places and have no favors to ask of the Federal Government.[2]

Thayer of Pennsylvania, speaking on the same day, is perhaps the most explicit of all in defining the purpose of the bill as one aimed at **laws** rather than individual conduct:

> Sir, if it is competent for the new-formed Legislatures of the rebel States to enact **laws which oppress** this large class of people who are dependent for protection upon the United States Government, to retain them still in a state of real servitude; if it is practicable for these Legislatures **to pass laws and enforce laws** which reduce this class of people to the condition of bondmen; **laws** which prevent the enjoyment of the fundamental rights of citizenship; **laws** which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; **laws** which impair their ability to

[1] id 1160.

[2] ibid 1160.

make contracts for labor in such manner as virtually to deprive them of the power of making such contracts, and which then declare them vagrants because they have no homes and because they have no employment; I say, if it is competent for these Legislatures to pass and enforce **such laws**, then I demand to know, of what practical value is the amendment abolishing slavery in the United States? . . .

What is the necessity which gives occasion for that protection? Sir, in at least six of the lately rebellious States the reconstructed Legislatures of those States have enacted laws which, if permitted to be enforced, would strike a fatal blow at the liberty of the freed men and render the constitutional amendment of no force or effect whatever. . . . That, sir, demonstrates the necessity for enforcing the guarantees of liberty and of American citizenship conferred by the Constitution.[1]

(b) **Statements of Opponents of the Act.**

Turning now to the opponents of the Act, here is what was said on January 29, 1866 by Senator Saulsbury, one of its severest critics, a man who as former Attorney-General of Delaware was presumably well versed in legal matters:

But there has never been a time when if the State governments had been destroyed society would not have been reduced to chaos. And yet, sir, these States thus securing to the citizen all his rights of person and property, and reserving to themselves out of the powers granted to the General Government these rights or protection to their citizens; these States which never granted or meant to grant to the Federal Government any such authority, find them-

[1] id 1151, 1153.

selves by this bill **invaded and defrauded of the right of determining who shall hold property and who shall not** within its limits, who shall sue and be sued, and who shall give evidence in its courts. . . . **If you can determine who shall hold property in a State then you can enact laws for the protection of the owner in its possession. Then also you can determine who shall not hold property within a State** . . . Such an assumption of power on the part of Congress ought to arouse the people of the whole country to a sense of impending danger.[2]

In the House, the bill's leading opponents were Rogers of New Jersey, Kerr of Indiana, and Bingham of Ohio. Here is what they had to say on the point in question.

Rogers speaking on March 1, 1866:

Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with **these statutes and the local regulations of a State**, then, by parity of reasoning, it has a right to enter the domain of that State, and inflict upon the people there, without their consent, the right of the Negro to enjoy the elective franchise to the same extent that it is accorded to the white men in that State.[1] . . .

Kerr on March 8, 1866:

This bill rests upon a theory utterly inconsistent with and in direct hostility to every one of these authorities. It asserts **the right of Congress to regulate the laws which shall govern in the acquisition and ownership of property in the States**, and to determine who may go there and purchase and hold property, and to protect such persons in the enjoyment of it.

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[2] S. p. 478.

[1] H. pp. 1121-1122.

The right of the State to regulate its own internal and domestic affairs, to select its own local policy, and make and administer its own laws for the protection and welfare of its own citizens, is denied.[1]

Bingham on March 9, 1866:

Now, what does this bill propose? To reform the whole civil and criminal code of every State government by declaring that there shall be no discrimination between citizens on account of race or color in civil rights or in the penalties prescribed by their laws.[2] . . .

(c) **Explanation in President Johnson's Veto.**

Finally, let us see whether President Johnson's veto showed, as the government claims,[3] that the bill was not aimed at making the Negro "legally competent to own and acquire property."

Referring to the second section of the bill as intended "to afford discriminating protection to colored persons in the full enjoyment of all the rights secured to them by the preceding section," the President had this to say:

This section seems to be designed to apply to **some existing or future law of a State** or Territory which may conflict with the provisions of the bill now under consideration. It provides for counteracting such **forbidden legislation** by imposing fine and imprisonment upon the legislators who may pass such **conflicting laws**, or upon the officers of [redacted] who shall put or attempt to put them into execution. **It means an official offense—not a common crime committed**

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[1] id H. p. 1270.

[2] id H. p. 1293.

[3] Govt. br. 30.

> against law upon the persons or property of the black race. Such an act may deprive the black man of his property, but not of the right to hold property. It means a deprivation of the right itself, either by the State judiciary or the State legislature. It is therefore assumed that under this section members of State legislatures who should vote for laws conflicting with the provisions of the bill, that judges of the State courts who should render judgments in antagonism with its terms, and that marshals and sheriffs who should, as ministerial officers, execute processes sanctioned by State laws and issued by State judges in execution of their judgments, could be brought before other tribunals, and there subjected to fine and imprisonment for the performance of the duties which such State laws might impose. The legislation thus proposed invades the judicial power of the State.[1]

We submit the foregoing evidence so that the Court may decide whether the opposing briefs have presented a true version of the congressional purpose that was behind the Civil Rights Act of 1866.

It seems to us, however, that one could not wish for a more reliable aid to the Court's judgment on this question than the "eye-witness" report that was given that very year by Supreme Court Justice Swayne, in the course of an opinion rendered by him while sitting as a Circuit Justice, and with his words we conclude this portion of our discussion:

> Legislative oppression would have increased in severity. Under the guise of police and other regulations, slavery would have been in effect restored. . . . It was to guard against such evils that the second

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[1] McPherson, *The Political History of the United States During the Reconstruction*, 76 (1871).

> [i. e., the enabling section] of the [thirteenth] amendment was framed. . . . **Almost simultaneously with the adoption of the amendment the course of legislative oppression was begun. Hence, doubtless, the passage of the Act under consideration.**[1]

B.

SUCH A CONSTRUCTION WOULD BE CONTRARY TO ITS USE AND INTERPRETATION SINCE ITS ENACTMENT.

From the purpose and meaning given to the statute in 1866, we turn now to consider how it has been interpreted and used in the century that has intervened.

The government brief takes great pains to point out that the statute has never been repealed and its constitutionality has been "vindicated" (22-23). This we do not deny. When, however, the government insists that it has not been somewhat of a "dead-letter," we may be excused for quoting one of the learned counsel on the NCADH brief who has apparently made a close study of its history:

> Section 1982 has led a relatively quiet existence and, as applied to real estate, has shown few, if any signs of life. It has been mentioned in three Supreme Court decisions but has been given sufficient weight in only one.[2]

To the three cases cited by him—*Buchanan v. Worley,* 245 U. S. 60 (1917); *Oyama v. California,* 332 U. S. 633 (1947); and *Hurd v. Hodge,* 334 U. S. 24 (1948)—we would add another: *Corrigan v. Buckley,* 271 U. S. 323 (1926).

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[1] *U. S. v. Rhodes,* 27 Cas. 785, 793 (Cir. Ct. Ky., 1866).

[2] Joseph B. Robison, *supra* 3, fn. 1, 463-464.

In the earliest of these, *Buchanan*, it is quite evident that the statute, as well as the Fourteenth Amendment, which was also invoked, was used to challenge a **law**, not private conduct. An **ordinance** of the City of Louisville prohibiting Negroes from living in any block in which white residents predominated, and vice versa, was declared to be violative of the Act of 1866 and its re-enacted 1870 counterpart, because—

> The right which the **ordinance** annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person.
>
> It is urged that this proposed segregation will promote the public peace by preventing race riots. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished **by laws or ordinances**. . . .[1]

How do the three principal briefs regard this case? The petitioners[2] and the NCADH brief[3] cite it only to establish its constitutional validity under the authority of the Fourteenth Amendment, which, as we have said we do not question. The government, however, thinks it should be **repudiated because** it confines the statute to a narrow scope" that does "not faithfully reflect the setting of 1866 or subsequent history."[4]

Let us look at the next case in point of time, *Corrigan v. Buckley*. There the court, presaging one of the prin-

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[1] 245 U. S. 81. Emphasis added.

[2] 24.

[3] 73.

[4] 27-28. *Hurd v. Hodge* is included in this repudiation. See *infra* 32.

ciples laid down in *Shelley v. Kraemer*, 334 U. S. 1 (1948), by holding that a restrictive covenant does not by itself violate the constitution, refused to reverse the courts of the District of Columbia which had enjoined violation of the covenant. The result of the case seems at first blush to be contrary to *Shelley*. But, as the court in *Shelley* explained, the injunction in *Corrigan* was by a federal, not a state court; hence, no state action was involved as in *Shelley*, and the question of the validity of court enforcement by a federal court had not been put "properly before the Court" (p. 8). Although the Petitioners' and NCADH briefs criticize the "dicta" in *Corrigan* for confining the reach of the Thirteenth Amendment,[1] they seem to take the following passage about the Act of 1866 "lying down":

> The claim that the defendants drew in question the "construction" of §§ 1977, 1978 and 1979 of the Revised Statutes, is equally unsubstantial. The only question raised as to these statutes under the pleadings was the assertion in the motion interposed by the defendant Curtis, that the indenture is void in that it is forbidden by the laws enacted in aid and under the sanction of the 13th and 14th Amendments. Assuming that this contention drew in question the "construction" of these statutes, as distinguished from their "application," it is obvious, upon their face, that while they provide, inter alia, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, **they, like the constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.** (271 U. S. at 331. Emphasis ours.)

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[1] At 17 and 18 respectively.

Let us now pass to the next in time of the four cases, *Oyama v. California.* Strangely enough, this case is not even mentioned in the Petitioners' or the ACADH brief, and is referred to by the government mainly to prove that Section 1982 is constitutional under the Fourteenth Amendment because it was re-enacted after the adoption of that amendment. Since, however, it is one of the few cases in which application of the section to the subject of real estate was approved by this court, it deserves a closer look.

The court there upheld the **legal right** of an American citizen of Japanese parentage to own land in the face of the California Alien Land Law, which the court found was racially discriminatory. If we substitute "Black Code" for "Alien Land Law", we are right back to the type of situation against which, as we have seen, the Civil Rights Act of 1866 was directed. The case therefore could have been decided, without any stretching of the statute, upon what is now Section 1982. It is no wonder, then, that Chief Justice Vinson, speaking for the Court, refers to it in a single sentence, with a footnote quoting the language of the section. The sentence reads as follows:

> By federal statute, enacted before the Fourteenth Amendment, but vindicated by it, the states must accord to all citizens the right to take and hold real property (334 U. S. at 640).

This reference to the Fourteenth Amendment makes it appropriate at this point to pause and go back to the year 1866. For, it was also in that year, only two months after it had enacted the Civil Rights Act, that Congress adopted the joint resolution proposing the Fourteenth Amendment for submission to the states.[1] The result was

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[1] Fleming, *Documentary History of Reconstruction,* Vol. I, 478 (1906).

that "**The Civil Rights Bill of 1866 was practically superseded by the first section of the Fourteenth Amendment,**"[2] and consequently "has had little impact on the course of events."[3]

True, the Civil Rights Act of 1866 was substantially re-enacted in 1870, after completion of the adoption of the Fourteenth Amendment by the states in 1868. But what was the manner of its re-enactment? Hardly one to indicate that it was anything but a perfunctory "let's make sure" appendage hooked on at the very last minute to a piece of legislation whose very title (until that last moment) indicated that its purpose was the important but limited one of implementing the recently adopted Fifteenth Amendment by providing specific remedies, including criminal penalties, "to enforce the Right of Citizens of the United States **to vote** in the several States of this Union."[1] (Emphasis ours.)

In any event, and returning now to *Oyama*, the mere fact that the section under consideration was re-enacted after the adoption of the Fourteenth Amendment evi-

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[2] Stephenson, *Race Distinctions in American Law*, 106 (1911).

[3] Robison, *Housing—The Northern Civil Rights Frontier*, 13 Wes. Res. L. Rev. 101, 109 (1961).

[1] The bill was introduced in the House on April 18, 1870, and in the Senate on April 19, as "A bill to enforce the fifteenth amendment to the Constitution of the United States." Cong. Globe, 41st Cong., 2d Sess., H. p. 2755 and S. p. 3479. It was passed by the Senate on May 20, 1870 (id S. p. 3689) and by the House, on an agreed conference report on May 27, 1870 (id. H. p. 3884). On the very day of its passage by the Senate, indeed after the final vote was taken, Senator Steward successfully moved "to amend the title by adding 'and for other purposes.'" (id S. p. 3690). Up to that moment the bill was being considered and the debates on it are recorded in the Congressional Globe as dealing with "Enforcement of Fifteenth Amendment." The incorporation of the Act of 1866 by way of a brief section (18) seems not to have been given any attention throughout the long and vigorous debates on the bill.

dently carried no additional weight with the court in that case, except for the incontestable proposition that the section was now "vindicated", i. e., constitutionally valid—a proposition which undoubtedly had been shrouded in considerable doubt so long as the constitutional authority for this section could be found only in the anti-slavery prohibition of the Thirteenth Amendment[1] The entire tenor not only of the opinion of the Chief Justice, but even more so of the concurring opinions, clearly indicates that the decision in *Oyama* was based primarily on constitutional grounds and not at all on the statutory survivor of the Civil Rights Act of 1866.

But if further confirmation is needed for the inutility of the statute to provide relief against private conduct, the remaining case, *Hurd v. Hodge, supra,* must certainly remove any possible doubt. Decided on the same day as *Shelley,* the court there held, in a situation reminiscent of *Corrigan,* that enforcement of a restrictive covenant even by a federal, as distinguished from a state, court was unconstitutional and violative of the statute as well. Speaking for the Court, Chief Justice Vinson, after pointing out, as he had implied in *Shelley,* that *Corrigan* could not "properly be regarded as an adjudication of the issue" presented in *Hurd,* had this to say about the statute:

> We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. **The action toward which the provisions of the statute under consideration is directed is governmental action.** Such was the holding of *Corrigan v. Buckley, supra.*

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[1] See *Hurd v. Hodge,* quoted *infra* ; *Bell v. Maryland,* 378 U. S. 226, concurring opinion of Justice Goldberg at 292-293; and Stephenson, *supra* 109.

In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve.

Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States. . . .

Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that **judicial enforcement** of the restrictive covenants by the courts of the District of Columbia is prohibited by the Civil Rights Act. (31-34; emphasis ours.)

Where does all this leave the petitioners and the *amici*, with their thesis that Section 1982 was not intended in 1866 and should not now be construed as being limited to state or government action? To the petitioners the language of the Chief Justice "is at most dictum, which is not in harmony with either the prior or subsequent opin-

ions of this Court."[1] The only prior decision cited is an opinion by District Judge Tueber in *U. S. v. Morris*, 125 Fed. 322, decided in 1903, which, like all the cases since *Hurd*, did not involve application of the specific statute, Section 1982, which is now under discussion. Counsel on the NCADH brief are content to dismiss *Hurd* merely with a footnote comment that its "erroneous dicta" require "clarification."[2]

The government, on the other hand, apparently senses the enormity of the obstacle raised by *Hurd* to its contention of non-requirement of governmental action. It therefore makes a valiant effort to explain it away. It does not disagree with it. On the contrary, it calls it "the dispositive ruling on the point." Here is its reasoning:

> Since only two-thirds of the lots in a single block in the District of Columbia were covered by the covenants in suit . . . it could not be clearer that the court there construed Section 1978 [Section 1982, U. S. C. 42] as reaching any substantial exclusion from housing on racial grounds—including, of course, the far more significant fencing-out involved in the present case.
>
> Our previous discussion shows that ruling to be entirely faithful to the text of the statute and its legislative history.[3]

Now, observe the very next three sentences:

> It remains, however, to show that Section 1978 annuls measures which have such an effect, although not in the shape of laws or offices. The decisions invoked here do not go so far. Indeed, there is language

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[1] Pet. br. 17.

[2] NCADH br. 83, fn.

[3] Govt. br. 37-38.

to the contrary in some of these opinions. *E. g., Hurd v. Hodge, supra,* 334 U. S. at 31.[2]

Of course, the language of *Hurd* is "to the contrary." The government said so very emphatically in a prior passage, when it took the court to task for a "grudging reading" and a construction that did not faithfully reflect the setting of 1866 or subsequent history", and concluded that "confining section 1978 to that narrow scope would require repudiation of several decisions in this Court, including *Buchanan v. Warley,* and *Hurd v. Hodge,* supra."[3]

A finer example of sophistry can hardly be imagined: First the government treats *Hurd* as a **good** case, because: a) it resulted in a prohibition of Negro exclusion in a situation in which only a part, and not the whole of an area, was affected by the attempted restriction; b) this means that racial exclusion is prohibited even when it is not total, so long as it is a "substantial" or "significant fencing-out"; and c) since the court's decision was admittedly based on Section 1982, this means that Section 1982 may be invoked to prohibit any kind of "substantial" or "significant" fencing-out of Negroes. What we ask, has all this to do with **the specific question whether a pre-requisite to the application of the section is governmental action?** We do not deny that proper application of the section, against some kind of **governmental** action, e. g., court enforcement, may in some situations, as in *Hurd,* result in prevention of a non-total type of racial exclusion. But how does this prove that *Hurd* removed **the requirement of governmental action as a condition to application of the section in the first place?** Does not the clear language of the court indicate the contrary?

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[2] id 38.

[3] id 27-28.

At this point, however, confusion becomes worse confounded. *Hurd* now becomes one of the **bad** cases, along with *Corrigan*. Both "require repudiation!"

We respectfully suggest that instead of resorting to such legerdemain the government would do well to study the crystal-clear words of Mr. Justice Black, which, though uttered in the course of a dissenting opinion, probably present as succinct and illuminating a summary of the existing case law on the subject under discussion as will be found anywhere:

> Thus, the line of cases from Buchanan through Shelley establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to "inherit, purchase, lease, sell, hold, and convey" property **prohibits a State**, whether through its legislature, executive, or judiciary, from preventing the sale on grounds of the race or color of one of the parties. Shelley v. Kraemer, supra, 334 U. S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership; "the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." Buchanan v. Warley, supra, 245 U. S., at 74. This means that the **property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling as when the property owner chooses not to sell to a particular person or not to admit that person, then, as this Court emphasized in Buchanan, he is entitled to rely**

> on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use. *Bell v. Maryland*, 378 U. S. 326, 330-331. (Emphasis added.)

Before concluding this subdivision of our argument, we would remind the Court that we are not here dealing with the meaning of the term "government action". That problem will be taken up in connection with the discussion of the Fourteenth Amendment and the concept of "state action" in relation thereto. Nor are we here concerned with whether Congress can, under Section 5, the enabling section, of that Amendment, enact legislation which, though directed at private conduct, is deemed by Congress to be necessary in order to effectuate the prohibitions of that amendment; as, for example, by enacting a "fair housing law."

Here the question is a simple one and requires a simple answer. The petitioners and their supporting *amici* contend that a particular piece of congressional legislation was not meant by the Congress of 1866 and is not today regarded by this Court as being limited to discrimination by governmental action. Our argument thus far has been directed at this specific contention, at answering only this question: Was the application of Section 1982 originally intended to require, and does it now require, that the discrimination be by, or in the form of, governmental action? We entertain the hope that we have succeeded in showing that the answer is decisively in the affirmative.

C.

SUCH A CONSTRUCTION WILL REQUIRE THE COURT TO ASSUME DIFFICULT AND NON-JUDICIAL FUNCTIONS.

1. Because the Language of Section 1982 Is Too Broad.

All of the principal briefs seeking to apply Section 1982 to the facts in this case call attention to the importance of **housing** as a cardinal and urgent reason. Some of the briefs, most notably that of the NCADH, devote extensive portions of their discussion to show, in the words of that brief, that "Racial segregation in housing is an immediate and pressing evil," and, that, therefore, the Court "should now declare that the Act means what it says and is constitutionally applicable to bar discriminatory sales of real property!"[1]

But, it is not only real property that the Section covers. It also includes "personal property." As to this, not a word is said in any of the briefs. This is not surprising. For not only does the inclusion of personal property reinforce the view that the framers of the 1866 Act could not have intended it to extend to private, as distinguished from governmental, discrimination. Its continued presence in today's Section 1982 makes it difficult, if not impossible, for the court to construe it so.

What, we ask, could the Congress of 1866 have had in mind when it made a Negro's right to buy, sell, and hold "personal property" the same "as is enjoyed by white persons!" If we construe the statute as merely prohibiting any **laws** from restricting the Negro's **legal rights** in such property unless the white man's rights are similarly

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[1] NCADH br. 8.

restricted, the Congressional purpose becomes clear and free from any difficulty of application.

This purpose arose out of the restrictions directed against Negroes with respect to certain kinds of personal property. Such restrictions were a part of all the Black Codes and were retained even after the Negro was emancipated. As one eminent authority has written:

> The Southern States had been afraid of the free Negro. He was a sort of irresponsible being . . .. As one turns to the first laws passed by the Southern States after Emancipation, he should keep in mind that these States were only grappling with the old problem . . ..[1]

The author then proceeds to describe those local **legislative** restrictions. Among them, in most of the states of the South, it was unlawful for a Negro to buy or possess, or for anyone to sell to a Negro, any knife, sword, firearms or ammunition without a special license.[2] Many of them also prohibited the purchase by, and the sale to him of intoxicating liquor.[3]

When, therefore, Congress set itself to the task of prohibiting **all legislative** discrimination, it made sure that even restrictions on such things as fire-arms and liquor would be the same as were imposed on white persons. It did so by adding the words "personal property." This would create no problem because, as we have shown, the Act was aimed only at **laws**, not private individual conduct.

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[1] Stephenson, *supra*, 38-39.

[2] id 43-44.

[3] ibid.

It is only when the Section is given the construction that petitioners and *amici* claim for it here, that problems are created, a Pandora's box of problems. For would it not mean that whenever an individual sells **anything** he must refrain from racial discrimination? Would it not mean that any offer or indication of a desire to sell **any** item, be it food, clothes, furniture, even a family heirloom, would be constricted by the statute? Would it not mean that the statute would subject not only large distributors and retailers, but even the small shop-keeper, to the hazard of a suit charging discrimination?

But even if we overlook the inclusion of personal property, the fact that the section does not limit the kind of **real estate** that is within its sweep likewise tends to contradict the construction claimed for it. Under that construction, every type and form of real property, commercial, farming, and recreational, as well as residential, would be covered. And within the residential field, not only subdivisions, large and small, not only apartment houses, large and small, not only flats and single residences, but even a single rented room in a residence and the proverbial shack in the woods would be subject to the statute. For it makes no distinction as to size or importance—something which the petitioners and their supporting *amici* frequently overlook when they emphasize the "substantial" or "significant" role of a subdivision as justifying application of the statute. Again we point out that here we are discussing the prohibition of **this specific statute.** We are not here considering whether Congress has the **power,** under either the Thirteenth or the Fourteenth Amendment, to enact some other kind of legislation, e. g., a fair housing law, that would by appropriate definitions recognize such distinctions.

The government does not think that the statute's broad language raises much of a problem. Although it admits

that "its application in the present context, unfamiliar to the framers, has no established precedent", it urges that no resort be had to "'ingenious analytical instruments' to avoid giving Section 1978 [i. e. 1982, U. S. C. 42] 'a sweep as broad as its language.' "[1]

Do we then, understand the government as saying that the Court should make its decision purely *ad hoc*? On a matter which the government described in its Memorandum petitioning this Court to grant certiorari as raising a question that is "one of large public importance",[2] is it seriously suggesting that the Court ignore what its decision may mean as an exercise of the judicial process. Is that process no longer to be one of "principled" decision-making? Without going further into what we believe is the issue that lies at the very core of this case, one which we will consider more fully when we take up the consequences of applying the Fourteenth Amendment to this case, and considering only the application of Section 1982, we cannot do better, perhaps, than again to defer to the view of the learned counsel on the NCADH brief:

> It hardly needs to be said that, if the courts were persuaded to accept a broad interpretation of Section 1982, the effect would be tremendous. A strong factor working against such an interpretation is that it would do too much. **It would instantly create a fair housing law for all states and territories, without any of the exemptions that are usually taken for granted.** [In footnote: "Even the broad fair housing laws of Connecticut, New York, and Rhode Island, exempt the rental of one apartment in an owner-occupied two-family dwelling.] **Moreover, since the Act is not limited to real property, the provisions dealing with per-**

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[1] Govt. br. 24.

[2] At p. 1.

sonal property might constitute a nationwide law against discrimination in all retail stores."[1] (Emphasis added.)

To all of which we add our wholehearted "Amen!"

2. Because Section 1982 Provides No Enforcement Remedy.

The language of Section 1982 reproduces a portion of what was the first section of the Civil Rights Act of 1866. Here is that original section, with the words now constituting Section 1982 being shown in italics:

> That *all persons born in the United States*[2] and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, *shall have the same right, in every State and Territory* in the United States, to make and enforce contracts, to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, convey real and personal property,* and to full and equal benefit of

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[1] Robison, *supra* 3, fn. 1, 465. As to the propriety of considering *consequences* in construing a statute, the following words of Mr. Justice Miller, speaking for the Court in the *Slaughter-House Cases,* are pertinent: "The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; . . . the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt." 83 U. S. 394, 409 (1873).

[2] This phrase is now "All citizens of the United States."

all laws and proceedings for the security of person and property, *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

It will be seen that nowhere in this entire first Section of the original Act is there any mention of any **remedy** or **right to sue** for any kind of relief, civil or criminal. The section is thus described by an eminent authority, in an article cited several times in the NCADH brief:

> [It] does no more than make a general statement of constitutional policy and carries with it no civil or criminal sanctions. . . . As was said by Justice Strong in *Strauder v. West Virginia* this section puts in the form of a statute what was substantially ordained in the Fourteenth Amendment. . . . It contains a partial list of the rights which the Amendments' framers thought they were protecting, when they placed the privileges and immunities clause into the Amendment. **The only purpose now served by [it] is as an incomplete compendium of rights the violation of which may give rise to civil suit under other sections of Title 8** [now Title 42].[2]
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> The author then makes the following observation on the section that was added in 1871 and is now Section 1983 of Title 42 U. S. C.
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> Of far greater utility is section 43 of Title 8. It provides that every person who, **under color of state law,** subjects any person within the jurisdiction of the United States to the depreciation of any "rights, privileges, or immunities secured by the Constitution and laws" shall be liable to the injured party in an

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[2] Gressman, *The Unhappy History of Civil Rights Legislation,* 50 Mich. L. Rev. 1323, 1354-1355 (1952).

action at law or equity. Derived from the 1871 Act, **this section concerns state action only.**[3] (Emphasis added.)

The foregoing passage seems to bring out several highly significant points regarding the Civil Rights Act of 1866. **First**, the section of the Act out of which present Section 1982 was carved was simply a "general statement of constitutional policy" and by itself afforded no civil or criminal remedy. **Second**, at the time of its enactment the Act contained no civil remedy at all. **Third**, when a civil remedy was added in 1871, it was limited to violations of the Act under color of state law. And in connection with this third point, we would add: **Fourth**, the language of the "color of state law" limitation incorporated in the civil remedy of 1871 was identical with the limitation imposed on the **criminal** remedy, which had been the only remedy provided in the Act of 1866 for violation of the rights listed in its first section; and, **Fifth**, this same limitation now appears in Section 1983, and, as the District Court observed in its Memorandum Opinion, "alone of the civil right statutes, other than the Civil Rights Act of 1964, provides for a right of action."[1]

The foregoing analysis serves not only to confirm our thesis that the legislators of the Act of 1866 had only state action in mind, but also that as a result of its derivation from that Act the language of the present statute has nothing in it to afford petitioners the relief they seek in this case.[2]

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[3] ibid.

[1] Appendix to petitioners' brief, 18a.

[2] The same view as to the inutility of the statute was apparently expressed by the late Professor Mark DeWolfe Howe, when he testified at a House hearing on the 1966 Fair Housing Bill. When asked about the effect of the recent decision in the *Guest* case, in connection with the conduct of individuals in the sale of private

Interestingly enough, the government seems to agree with our analysis but only partially with our conclusion. In a footnote it admits that "individual action violating the substantive guarantees of [Section 1982] would in no event subject the offender to civil damages under 42 U. S. C. 1983 or criminal penalties under 18 U. S. C. 242 (both of which reach only acts done 'under color of law')."[3]

Apparently the government is unwilling to go so far as to claim that the Court in this case should "fashion" a remedy to give petitioners all the relief they seek under Section 1982, i. e., damages plus various injunctions. It suggests that the Court "make a ruling which, if novel, will operate only for the future, imposing no civil or criminal liability for the past without adequate notice."[1a]

This raises the all-important question of the propriety of the courts, engaging in the function—a highly legislative function—of "fashioning" a remedy. Our views on this question will be set forth later when we discuss the same problem in relation to the Fourteenth Amendment (Point II, B, infra).

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property, and whether it was not true that "there are no cases holding on that", he replied: "It is probably because we have no legislation to deal with that sort of matter." Report of *Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Reps., 89th Cong., 2d Sess., at p. 1576.*

[3] Govt. br. 25, fn. 12.

[1a] id 25.

POINT II.

PLAINTIFFS ARE NOT ENTITLED TO RELIEF UNDER THE FOURTEENTH AMENDMENT BECAUSE—

A. THE STATE IS NOT SIGNIFICANTLY INVOLVED; AND

B. TO GIVE SUCH RELIEF WILL REQUIRE THE COURT TO EXERCISE LEGISLATIVE FUNCTIONS UNDER GRAVELY INAPPROPRIATE CIRCUMSTANCES.

Foreword.

For their alternative ground, petitioners invoke the Fourteenth Amendment, in particular the clause in its first section that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Petitioners claim that this clause entitles them to relief even in the absence of legislation.

Our discussion of the validity of this claim must begin with an understanding on two points. First, we are not here concerned with the question of what may or may not be done under Section 5 (the enabling section) of the Fourteenth Amendment. To use the language of Mr. Justice Stewart, we "deal here only with the bare terms of the Equal Protection Clause."[1] Second, it must be shown

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[1] *United States v. Guest*, 383 U. S. 745, 755 (1966). The importance of this distinction was stressed in the brief submitted last August by Attorney General Clark when he appeared before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency. Discussing the "false analogy between judicial enforcement and congressional enforcement of the Equal Protection Clause", it went on to say: "The power of a court to enforce the clause arises directly from the clause itself, which speaks only of what states are forbidden to do. . . . Hence, courts enforcing the Clause can only forbid action by States or their local subdivisions. But the power of Congress to enforce the Clause arises from another section of the Fourteenth Amendment, Section 5 . . ." See Report of the Hearings on August 21, 1967, at p. 11.

that some form of state action is involved in the alleged discriminatory conduct. As to this, the words of Mr. Justice Douglas leave no doubt—

> It is, of course, state action that is prohibited by the Fourteenth Amendment, not the actions of individuals. So far as the Fourteenth Amendment is concerned, **individuals can be as prejudiced and intolerant as they like . . . The line of forbidden conduct marked by the Equal Protection Clause of the Fourteenth Amendment is crossed only when a State makes prejudice or intolerance its policy and enforces it.**[2] (Emphasis ours.)

This, then brings us face to face with the ever recurring problem of what is "state action", and, specifically, with its inner question: When is a state so "involved", or, as it is put in the more recent cases[3], so "significantly involved", that the requirement of state action has been met?

"This Court", as Mr. Justice White has observed "has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discrimination."[4] Although counsel for the petitioners believe they have come upon a "unifying explanation" for "all" the past decisions in the field of discrimination and one that will serve to resolve the issue in this case,[5] we confess we have made no attempt at any such achievement.

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[2] Concurring opinion in *Garner v. Louisiana*, 368 U. S. 157, 177-178 (1961).

[3] e. g. *Reitman v. Mulkey*, 387 U. S. 369, 378 (1967).

[4] ibid.

[5] Pet. br. 47, 49 fn.

We hope the Court will forgive us for saying that a strong deterrent has been the fact that so often "the opinion of the Court" has been accompanied not only by one or more concurring opinions, but also by opinions that are partly concurring and partly dissenting. And to complicate the matter even more, the number of dissenting Justices is at times so great that, as the Court of Appeals in this case observed in commenting on the effect here of the *Reitman* decision, it is quite conceivable that at least as to one of the aspects of our case those who joined in the Court's opinion in that case but disagreed with Mr. Justice Douglas' views might join with the four dissenters in rejecting the presence of state action in a situation like ours.[1]

Nor can we ignore the fact that the issue of state action has been argued innumerable times before this Court, has been plowed over by many pundits of constitutional law, and doubtless has been the subject of frequent and extensive discussions among the members of this Court. For us to attempt a "constitutional exercise" of our own would be presumptuous. *Quod licet Jovi non licet bovi!*

We shall confine our argument simply to pointing out certain fallacies in the material on which the structure of state action in this case is claimed to be supported. This, we believe, will be sufficient to dispose of the argument based upon the Fourteenth Amendment without requiring any deep diving into the waters of constitutional theory.

A.

THE STATE IS NOT SIGNIFICANTLY INVOLVED.

The claim that the state is significantly involved in the alleged discriminatory conduct of the respondents seems to be founded on two theories: One, that the laws and

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[1] Pet. App., 65a, 65b.

regulations licensing and governing a subdivision, and making certain services available to it, result in such involvement; Two, that the subdivision exercises governmental functions. We submit that the argument used to support each theory is fallacious.

1. The Fallacy in the Argument That State Action Results From the Laws and Regulations Licensing, Governing, and Making Services Available to, a Subdivision.

The petitioners and their principal supporting *amici* contend with varying emphasis that state action is present in this case because the state has **licensed** and **regulated** the development of the respondent Mayer's subdivision, and because certain services, like public utilities, and fire and police protection, are **made available** to the subdivision. In answering this contention, we cannot refrain from first calling attention to the anamolous and ironical position in which it places the Attorney General of Missouri, who has sponsored one of the *amicus* briefs.

One would suppose that in a case in which the State is being charged with being "significantly involved" in unconstitutional conduct, an appearance in the case by the State would be for the purpose of **challenging** the charge, either by denying that the conduct was unconstitutional or by denying that the State had anything to do with it. Here, however, we find the Attorney General of Missouri supporting a brief which insists that the State **is** guilty of participating in the discriminatory conduct because its purposes could "only be achieved with the assistance and by the joinder of state action."[1]

What is this "assistance"?

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[1] *Amicus* Brief of Missouri Commission on Human Rights, 3.

According to that brief, it is twofold: One part of it lies in the "detailed and comprehensive zoning ordinances and subdivision regulations";[2] the other in "the state's residence requirements applied to free public education".[3] When these are combined with the discriminatory conduct, says the brief, "the product is de facto segregation."[4]

If that is what the State's assistance consists of, and, if without that assistance the discrimination could not be achieved, then would it not be proper to ask this question: Why has the State not eliminated or corrected these ordinances and regulations and requirements?

The reason is simple and should be obvious. These ordinances, regulations, and requirements are completely "innocent" as a factor in the discrimination, except, perhaps on some metaphysical "but for" theory. On such a theory common sense tells us that state involvement could be shown in every act of every person. As counsel for the petitioners have so aptely put it: "if the act of 'permitting' is 'state action', then every activity of a private person . . . would be state action subject to the strictures of the Fourteenth Amendment."[1]

But, apparently the government and the NCADH group of *amici* do not agree with the petitioners. They, like the Missouri Attorney General, attach great importance to the local laws and regulations, for they regard them as a "delegation of State Powers" to the respondents, sufficient to render their subdivision a political subdivision of the State, even though "no State flag flies over" it

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[2] id 3, 24-27.

[3] id 2, 8-9.

[4] id 22.

[1] Pet. br. 44.

and "none of the respondents wears an official badge of State office."[5] Indeed, the government sees so much significance in these local statutes and regulations that it devotes its entire Appendix of 30 pages to reproducing their text.

The statutes are cited to show the "authority given political subdivisions"; specifically, to construct and repair public roads, and sidewalks, to establish and maintain parks, to have zoning power to facilitate adequate provisions for schools, to maintain peace, and to provide fire protection.[1] Since a subdivision "must have public roads and sidewalks, sewers, parks, access to schools, police and fire protection," and these services and facilities are either "supplied by or in behalf of the State"[2] or are permitted to be assumed by the developer, attention is drawn to the fact that "one of the main attributes of a municipal government is its power to levy assessments" and that respondents have that power also, including the power "if necessary to establish property liens to secure payment of the assessments."[3]

The ordinances of St. Louis County, where the Mayer subdivision is located, are also referred to for the purpose of showing the **power** given to a subdivision developer to exercise governmental functions, i. e. to provide markers, streets, sidewalks, water and sewage systems, fire protection, trees, signs . . . schools and parks."[4]

Finally, the government cites a statute permitting classification of a city or town of between 500 and 3,500

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[5] Govt. br. 13-18.

[1] Govt. br. 15 fn. 3.

[2] id 15.

[3] id 17-18.

[4] id 16 fn. 4.

persons as a city of "the fourth class." This statute leads the government to note that the residents of the subdivision "could incorporate as a municipality if they elected to do so!"[1]

Respondents respectfully submit that in their zeal to equate the Mayer subdivision with a municipality, for the purpose of showing state action, counsel for the government have, to put it charitably, used the aforesaid statutes and ordinances somewhat carelessly. The result is a distorted and misleading picture.

We note, to begin with, the misleading caption that is given to these statutes in the government's Appendix. It reads: "Missouri Statutes on Organization of Municipalities and *Subdivisions*"[2] (Italics ours). Would one not suppose from this caption that at least some of the provisions in these statutes apply to **subdivisions**? Such is not the case. The word "subdivision" appears nowhere. All of these statutes are contained in a chapter of the Revised Statutes of Missouri that is entitled "Provisions Relative to All **Cities and Towns**" (Ch. 71). (Emphasis ours.)

It is utterly pointless, therefore, to attempt to prove by these statutes that the State has conferred on subdivisions the powers that are given to municipalities. Just by way of example, one of the statutes cited (80.260) empowers the Chairman of the Board of trustees of an incorporated town or village to be "a conservator of the peace" and to "have exclusive original jurisdiction to hear and determine all offenses against the ordinances of the town."[3] How, we ask the government, would this prove that the developer of a subdivision or its trustees

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[1] id 16 fn. 5.

[2] Govt. br. 63.

[3] id 63.

or managers could exercise such police power? Another statute (71.340) gives any incorporated city, town, or village, the power to construct public roads, streets, and bridges, "leading to and from" such city, town or village.[2] Does this mean that the developer of a subdivision could give himself or his subdivision that power?

But, it may be asked, what about the power to levy assessments, and to secure them by property liens? That such a power does exist and is commonly exercised by a subdivision is quite true. But does that power come from the statutes governing municipalities? Not at all. Nor does it come from any county ordinance or commission regulations, which we shall presently examine. It is derived simply from the **general law** that accords to a property owner the right to impose restrictions on his own property that are not contrary to public policy. It is on the authority of the **general law**, the law applicable to all property owners, and not of any law empowering or favoring subdivisions only, that "Trust Indentures" conveying the "common areas" of a subdivision such as private streets and parkways, are conveyed to Trustees, and that such Trustees are given the power to maintain these areas and for that purpose to levy assessments. It is also by virtue of that **general law** that "Deeds of Restrictions" governing the size, height, design, and even use, of property in a subdivision may be imposed by the developers or, as is often the case, by the residents themselves, after the lots in a subdivision have been fully or substantially sold. One can only attribute the strange assertions in this part of the government's brief to counsels' apparent unfamiliarity with subdivision development and organization.

In this connection we must also call counsel on the NCADH brief to task for making the remarkable state-

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[2] id 63.

ment that "the developer **must** impose covenants on the use of land within the development which, under the law of Missouri, supersede and take the place of the regulations of the zoning ordinance."[1] The brief cites no statute, no ordinance, no regulation; for none will be found—at least not in Missouri, so far as we know. There is no legal obligation on the developer to impose **any** restrictions. But, if he chooses to do so, the restrictions cannot "supersede", they merely **add** to, those of the zoning law and must be complied with the same as the latter. In that sense it may perhaps be said that the owner's restrictions will "supersede" the zoning law. Our criticism, however, is that the purpose behind the statement seems to be, as in the government's brief, to prove that the developer's power to impose such restrictions is derived from some laws whereby the state has **delegated** special powers to subdivisions that are not accorded to any other kind of real estate. We submit that this is utterly erroneous, and that such power comes simply from the general law governing all real estate, whether it be a tiny parcel of ground or the acreage in a large subdivision.

But, what about the County ordinances? These too are set forth in great array in the Appendix to the government's brief. They too are cited to prove delegation of special powers to the developer of a subdivision. The truth of the matter is that they are **limitations**, not delegations of power. They lay down **requirements**, not benefits. They **restrict**, rather than expand, an owner's rights, if he desires not only to "subdivide" his property into lots (for which he needs no one's approval) but, in addition, to have their dimensions and locations, and the lay-out of the common areas, streets, easements, etc., as well as the Indentures of Trust and Restrictions, made recordable

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[1] NCADH br. 100.

(i. e., acceptable to the County's Recorder of Deeds), so that the individual lot-owners will be assured through such recording as to the dimensions and locations of their lots and that those common areas, streets, and easements will be properly maintained and made available to them and their successors in title. Because the County felt that uncontrolled development of such subdivisions might be harmful to a "co-ordinated, efficient and economical development of the unincorporated portion of the County," it adopted by ordinance a set of "regulations and minimum standards" applicable to subdivisions.[1] It is these regulations that are reproduced in the government's Appendix under the caption "St. Louis County Ordinances."[2]

One will search these regulations in vain to find a single power that is delegated to the developer or his subdivision. And, even when we examine them for **duties** or **functions**, what do we find? The only duty required of the developer, in addition to presenting a plan conforming to the Commission's requirements and paying certain fees, is an obligation to build a public street in two exceptional situations only. Here, again, the government's brief suffers from inaccuracy, when it asserts that a subdivision "**must** have public roads and sidewalks, sewers, parks, access to schools, police and fire protection."[3] We find no such mandatory regulation.

We have said enough, we believe, to show how fallacious is the argument based on **permission** or **license**, and how pointless the copious citation of statutes and regulations in the government's brief. The uselessness of licensing laws and regulations, as a factor in resolving the issue of state action, has never better been stated than by Mr.

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[1] Govt. br. 71.

[2] id 69.

[3] id 15.

Justice Black, though in dissent, in *Bell v. Maryland*, 378 U. S. 226, 333:

> Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices.

We have so far been dealing with licenses and regulations, as forms of "assistance" to the developer of a subdivision. What we have said would apply to the school residence requirements that are given such great attention in the Missouri brief. They too are part of the general law of the State and are as "innocent" a factor in the alleged discriminatory conduct as those licenses and regulations. It would, of course, also apply to the availability of incorporation, of the services of public utilities, of fire and police protection. All these are as available to the general public as they are to the residents of a subdivision.

This does not mean, however, that there are not some forms of "assistance" which, though "innocent" in themselves, may render the State a participant in the discrimination within the Fourteenth Amendment concept of "state action." In those cases, however, it will be found that the "assistance" was given to the **particular** discriminator, and was not one available to the general public under the general law.

A good example is *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961), a case cited in all the principal briefs. There a privately owned and operated restaurant was located in a building constructed with public funds and used for a public purpose, i. e., a municipal parking facility. Refusal of service to a Negro by the restaurant operator was held by the court to be refusal by state action. Why? Because the special assistance

there given by the State to the discriminator, by allowing him to conduct his business on what amounted to state property, rendered the State "significantly involved". Similarly, in *Simkins v. Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (1963), cert.. den. 376 U. S. 938 (1964), the hospital though privately operated, had received "massive financial aid" through funds made available to hospitals willing to participate in the government's Hill-Burton program. Was this not obviously a "significant" involvement of government?

No such type of special aid is claimed in this case. As has been seen, the only "assistance" charged to the State is in the laws and ordinances that are purely permissive and regulatory, and as necessary and available to all as is the general body of state law.

Again we cannot refrain from mustering to our side some observations made not too long ago by the learned counsel on the NCADH brief whose writings we have previously quoted:

> If the prohibition applies to all individual conduct permitted by the State, it applies to all individual conduct. The state action limitation is then a dead letter. It would be better to kill it officially, than to engage in the legal fiction that inaction is action.[1]

2. Fallacy of the Argument Based on the Subdivision Performing Governmental Functions.

As has been said, the petitioners show little reliance on the argument of state action based upon the help given to a subdivision developer through its licensing and regulatory laws. Instead, they rest their position on the theory that respondents are performing services of a governmental nature and that they are therefore a "de facto

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[1] Robison, *supra* 3, at 468.

government." As they so rhetorically put it: "Look not at what the government is doing for Respondents, but at what Respondents are doing for the government."[1]

"When completed", say the petitioners, the subdivision will be a "town", in which there will be recreational facilities for golf, tennis and swimming. "The streets will be open, and community-wide amenities like garbage collection will be communally provided. There will even exist the power to "tax" residents by levying assessments and collecting them judicially."[2]

To support the argument that the exercise of such functions even by a private person is sufficient to meet the requirement of state action, counsel for petitioners review a number of familiar cases to show that this theory of *governmental function* provides a "unifying explanation". In the traditional view, they argue, the focus was "on 'state' rather than 'action'."[3] This is unsatisfactory, say the petitioners, because it has been employed to require a "property law nexus", and such a requirement would be inconsistent with the decisions in cases in which such property connection was so "tenuous" as to be practically non-existent, as e. g., in *Hampton v. Jacksonville,* 304 F.2d 320 (1962), cert. den. 371 U. S. 911 (1962) and in *Smith v. Holiday Inns of America,* 336 F.2d 630 (1964), or even completely non-existent, as in the voting cases culminating in *Terry v. Adams,* 345 U. S. 461 (1953) and, most pointedly, they feel, in *Marsh v. Alabama,* 326 U. S. 501 (1946).

Petitioners' purpose in thus shifting the focus of inquiry is to avoid explaining away the inescapable fact that the property here involved is **private** property. Their

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[1] Pet. br. 40.

[2] id 51.

[3] id 41.

approach is not new, and it has been sharply criticized as being confusing and perhaps even a little dangerous.[1] However, for the sake of argument, we will accept it. For we believe that a demonstration of how inapplicable it is to the present situation, will point up, perhaps better than anything else, the vice that underlies the whole structure of petitioners' case under the Fourteenth Amendment.

We must begin by taking a close look at *Marsh v. Alabama,* supra, the case so heavily relied on by petitioners, as well as by the government and the NCADH. This case, say the petitioners, "helps immensely to give form and substance" to their answer of what is meant by "action" in the concept of state action.[2]

It must be admitted that at first blush *Marsh* seems to have a striking resemblance to our case, for it involved a privately owned "company town". Here is the description of the town as given in the opinion of the Court by Mr. Justice Black:

> The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that, it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from

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[1] Abernathy, *"Expansion of the State Action Concept Under the Fourteenth Amendment,"* 43 Cornell L. Q. 375, 406-407 (1958).

[2] Pet. br. 44.

which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, **make use of a company-owned paved street and sidewalk** located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.[2] (Emphasis ours.)

Into this town came a member of the religious order known as Jehovah's Witnesses, and attempted to distribute religious literature **while standing on a sidewalk** near the post office. She was warned that this was a violation of a company notice, posted in the stores, prohibiting street peddling and solicitation, without a permit. When she was "asked to leave the sidewalk", she refused and was arrested and charged with violating an Alabama Statute making it a crime to remain on the premises of another person after being warned not to do so. She was convicted and when her conviction was

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[2] 326 U. S. 502-503.

affirmed by the Appellate Court of Alabama, she appealed to the United States Supreme Court.

On the appeal the State of Alabama contended that the property involved was private and that therefore the corporation's right to control the inhabitants of the town was "coextensive with the right of a homeowner to regulate the conduct of his guests."[1] To this the Court, in reversing the conviction, replied, as the petitioners have pointed out, "We do not agree that the corporation's property interests settle the question."[2]

But then the Court added the following sentences, the real significance of which seems to have been utterly lost on the petitioners and all the *amici* who have cited the case:

> **The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .** Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated **primarily to benefit the public** and since **their operation is essentially a public function,** it is subject to state regulation. And though the issue is not directly analogous to the one before us we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce. . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical in-

[1] id 506.

[2] ibid.

terest in the **functioning of the community** in such manner that the channels of communication remain free.''[1] (Emphasis ours.)

To explain why we have emphasized some of the language in the above quotations we must now turn to a later case, also involving distribution of religious literature on private property by one of the Jehovah's Witnesses. This case, *Watchtower Bible & Tract Society, Inc. v. Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948); cert. den. 335 U. S. 886 (1948) rehearing den. 335 U. S. 912 (1949), is not mentioned in the government and NCADH briefs. Petitioners cite it briefly and only to show that the decision in *Marsh* must not be construed to mean that the householder in that company town ''acting individually'' could not ''constitutionally evict religious proselysizers from their homes'', for, they say, it ''has never been held that the First Amendment runs into one's living room.''[2]

The private property on which the Jehovah's Witnesses sought to distribute their literature in the *Watchtower* case was perhaps not a ''town''. Was it just a ''home'' or a ''living room''? Here is how it is described in the opinion of the New York Court of Appeals:

> Defendant, as a private proprietor, owns in the borough of The Bronx in New York City, **a residential community** called Parkchester, which is said to be the **largest of its kind in the world**, covering 129 acres and **housing 12,000 family units** made up of some 35,000 people, in 171 adjoining and ''interrelated'' apartment houses. These buildings are seven to twelve stories high. Through Parkchester run two public highways and in it are a number of private

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[1] id 506-508.

[2] Pet. br. 45.

streets, lanes and parks, as well as shops, offices, and automobile service stations, the latter operated by tenants of defendant. All of the apartments are held under written leases from defendant. Each such apartment lease binds the tenant to comply with such rules and regulations as the landlord shall from time to time deem necessary for the safety and care of the buildings, "and the preservation of good order therein, as well as the comfort, quiet, and convenience of other occupants of the building" (433). (Emphasis ours.)

The owner of this "residential community" published a regulation which would have prohibited the distribution of literature by the Jehovah's Witnesses "in any apartment building in the Parkchester development." The Witnesses sued to have this regulation declared unconstitutional under both the New York and the Federal constitutions. The New York Courts held against them and the United States Supreme Court refused to review that holding.

How can this be explained in the face of *Marsh v. Alabama*? The New York Court of Appeals gives the answer, and in it lies the explanation for our emphasis of some of the language of Justice Black in *Marsh* and our belief that petitioners' theory of "governmental function", useful as it may be, has no application to our case. Here are the pertinent passages from the opinion of the New York Court of Appeals, distingushing *Marsh* as well as *Tucker v. Texas*, 326 U. S. 517, decided the same day as *Marsh*:

> **Marsh's activities all took place on a sidewalk** in Chickasaw, Alabama, a "company town" wholly owned by a shipbuilding corporation. The sidewalk on which Marsh stood as he passed out his pamphlets was thus owned by the corporation, but it was, in

appearance and use, an ordinary public sidewalk in front of retail stores. Justice Black's opinion noted that Lovel v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, and other cases (see People v. Barber, 289 N. Y. 378, 46 N. E. 2d 320) had made it plain that a **municipal corporation cannot ban the distribution of literature on its "streets, sidewalks, and public places"** [326 U. S. 501, 66 S. Ct. 278]. The same rule, for the same reasons, held the Supreme Court, **applied to the sidewalks of Chickasaw,** which differed from similar sidewalks in other municipalities, only in that in Chickasaw title to the sidewalks was in a private corporation. Tucker v. Texas, supra, was a companion case to Marsh v. Alabama, supra, differing only in the circumstance that Hondo Navigation Village in Texas, was owned in its entirety, not by a business corporation, but the United States of America. "According to all indications", the Supreme Court remarked, "the village was freely accessible and open to the public and had the characteristics of a typical American town." . . . While not specifically so stated in the opinion, it seems clear that **Tucker's preaching** and leaflet distribution **was in the streets or sidewalks** of the village, or from door to door, and not inside any residential building.

Both the Marsh and the Tucker cases, supra, seem to rest on the doctrine so clearly stated in Hague v. Committee for Industrial Organization, 307 U. S. 496, at page 515, 59 S. Ct. 954, at page 964, 83 L. Ed. 1423: **"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,** communicating thoughts between citizens, and discussing public questions. **Such use of the streets and public places** has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." A narrow inner

hallway on an upper floor of an apartment house is hardly an appropriate place at which to demand the free exercise of those ancient rights.

Our purpose in thus briefly analyzing those decisions is to show that they do not (nor do any others of which we know) go nearly so far as appellants would have us to go here. Parkchester, like Chickasaw, Alabama, and the Federal housing community in Texas, is privately owned, but there the similarity as to facts ends. **It is undisputed that this defendant has never sought in any way to limit the Witnesses' activities on the streets or sidewalks of Parkchester, some of which are privately, and some publicly, owned.** (79 N. E. 2d 436. Emphasis ours.)

It should now be evident why we attach even greater significance to *Marsh* than do the petitioners and the *amici*. For, if the case reveals anything, especially in the light of *Watchtower*, it is the all-important distinction between private property that has been **opened up for public use** and private property that has not been so opened up. As Mr. Justice Black observed, in the passage we have quoted from Marsh and now quote again:

> The more an owner, for his advantage, opens up his property **for use by the public** in general, the more do his rights become circumscribed by the statutory and constitutional **rights of those who use it** (Emphasis again added).

It matters not, as these cases show, that the owner controls and exercises governmental functions over a sizeable "town" or a "residential community" of 35,000 people. The important question is: Has he, or to what degree, has he, opened up the property in question "for **use by the public?**"

What is the property here as to which violation of the Fourteenth Amendment is claimed? It is not any of the

"streets, sidewalks and public places" of the respondents' subdivision. The closest the complaint here comes to charging restrictions on such publicly used areas is the allegation that two of the defendants "have prepared or shall prepare a deed embodying certain restrictions on the use of the property sold to individual buyers in said subdivision and on that land which is common to all residents" (Pet. App. 11a). Petitioners do not allege, nor indeed would they have any reason to allege, that these restrictions would be racially discriminatory as to the use of the streets, sidewalks, and public places.

The simple fact is that the only property claimed to be the subject of the unlawful discrimination is "Lot No. 7147", a lot, like all the others, never intended by the owner to be opened "for use by the public in general." These residential lots constitute the **private** portions of the subdivision, just as did the homes in Chickasaw and the apartments in Parkchester. Surely, if the hallways in an apartment in a residential community of 35,000 people can be regarded as "private property" and therefore outside the reach of constitutional prohibitions, a private residential lot in a subdivision must *a fortiori* be regarded as off-limits.

Perhaps the best way to illustrate our point is to ask this question: Would the company in *Marsh* be subject to constitutional restraint whenever it sold or leased a house in its own? Would the owner in *Watchtower* be subject to such restraint in leasing any of the apartments, or the "shops, offices and automobile service stations" in Parkchester? Indeed, may we not sharpen the point even more by asking this question: Suppose that the property is a public utility, say, a local gas or water company. Would its owner be violating the Fourteenth Amendment if he put it on the market but indicated he wanted to sell it only to someone of his own faith or race? We assume, of course, that no restriction would be put on the **use** of the facility,

which would clearly be unlawful, just as we agree would be any racial restrictions imposed by the people of petitioners' imaginary State of Neutrality[1] on its public utilities even though they were "unfranchised." But what about the homes in that imaginary State? Would their disposition be subject to the same considerations as the facilities used by the general public?

We submit that the sensible guide by which to answer such questions is that indicated by Mr. Justice Black in the passages we have quoted from *Marsh*. As was said in an exhaustive law memorandum submitted to a Senate Committee in 1966, in commenting on his "approach" to the problem—

> Such an approach would be more consistent with earlier, as well as more recent, decisions with respect to Fourteenth Amendment violations than to hold that the right to purchase or occupy property without discrimination on account of race is so secured by that Amendment that the individual home owner cannot with impunity refuse to sell or rent his home or any part of it on such a ground.[2]

We cannot better end this discussion than to quote the following commentary by a scholarly writer on the type of generalizations with which counsel for the petitioners embellish their argument on the Fourteenth Amendment:

> An uncautious extension of these generalizations is noted in the theory espoused by some writers to the effect that activities which are "fundamental" or

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[1] Pet. br. 53.

[2] The Library of Congress Legislative Reference Service, memorandum on "The Power of Congress to Prohibit Racial Discrimination in the Rental, Sale, Use and Occupancy of Private Housing", included in Report of Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 89th Congress, 2nd Sess. on S. 3296, et al., June 1966, 308 at 313.

"indispensable" in our society are, by definition, too important not to be considered as governmental functions, even though completely controlled and operated by private persons. The only problems to be solved under this approach are, first, the delineation of the political theory which demands that government undertake positively to provide all persons with all fundamentals of life, and second, the determination of which aspects of life are "fundamental" . . .

[A]ssuming that general agreement could be obtained to the effect that indispensable functions are governmental functions, or that they relate in some manner to the state even without specific statutory control, then **the problem remains of defining the line between the "fundamentals" and the "non-fundamentals" of life.**[1] (Emphasis added.)

B.

TO GIVE THE PETITIONERS THE RELIEF THEY ASK WILL REQUIRE THE COURT TO EXERCISE LEGISLATIVE FUNCTIONS UNDER GRAVELY INAPPROPRIATE CIRCUMSTANCES.

We come finally to an aspect of this case which we believe reveals more than anything else the vice that lies at its core. It lays bare what, despite the disclaimers of the petitioners and their chief supporting *amici*, is the real purpose of this suit.

Let us assume that this Court reverses the lower courts and adopts the contention of the petitioners that the Fourteenth Amendment applies. Will such a decision automatically give petitioners relief from the alleged discrimination? Not at all. Presumably the case will be remanded to the District Court, with instructions to overrule our Motion to Dismiss and proceed with the trial. At this point, however, the District Court will be faced

[1] Abernathy, *supra* 56, fn. 404-405.

with an interesting question. What is the proper remedy? What specific relief is to be given the petitioners? What particular orders are to be issued to the respondents?

In this respect the present case is quite different from the cases cited by the petitioners and the *amici*. In those cases, the relief followed simply and automatically from a holding of constitutional violation. Let us illustrate. In *Marsh*,[1] as in *Tucker*,[2] the holding of constitutional violation **automatically** wiped out the conviction for trespass and thereby gave the Jehovah's Witnesses the full relief that was asked. In Shelley,[3] it **automatically** enabled the Shelleys to move into the house which the Missouri courts had ordered them to vacate. In *Hurd*,[4] it **automatically** lifted an injunction and allowed Hurd to live in the covenant-restricted neighborhood. In *Barrows*,[5] it **automatically** relieved the defendant from liability for damages in a suit for violation of a racially restrictive covenant. In the group of "sit-down" cases, *Peterson*,[6] *Lombard*,[7] *Bell*,[8] it **automatically** freed the persons convicted under local trespass laws.

Even in the very recent *Reitman* case[9] there was no problem as to remedy, because when the Court there held that the article amending the California constitution violated the federal constitution, the immediate effect was

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1 326 U. S. 501 (1946).
2 326 U. S. 517 (1946).
3 334 U. S. 1 (1948).
4 334 U. S. 24 (1948).
5 346 U. S. 249 (1953).
6 373 U. S. 244 (1963).
7 373 U. S. 267 (1963).
8 378 U. S. 226 (1964).
9 387 U. S. 369 (1967).

to reinstate a California fair housing statute. That statute provided a specific remedy for its violation, i. e. "actual damages and two hundred fifty dollars (250) in addition" for each offense.[10] The Court did not have to search for a remedy. It was there.

But, it may be asked, what about some of the voting cases, in which damages and injunctions were granted by federal courts after a holding that the Fifteenth Amendment had been violated? The answer is very simple. In each of those cases the complainants were able to rely, and did rely, on Section 1983 of Title 42 U. S. C. or a predecessor counterpart thereof.[10a] That Section (set forth in petitioners' brief, 65) is concededly inapplicable here[10b] and is not invoked by the petitioners.

We come back then to our question. What is the proper remedy here? Interestingly enough, the government, in its brief, does not urge the imposition of damages. Its reason is that the case is "novel". It recommends that the remedy should "operate only for the future."[11] But operate in what way? Which of the injunctive orders requested by the petitioners should the Court allow? Should it grant the one that would enjoin the respondents from all racial discrimination in their subdivision "in the future?" Surely the Court has no authority here to issue that kind of injunction, if for no other reason than that this is not a "class action", as was, for example, the suit in *Baker v. Carr*,[12] where the plaintiff was suing for him-

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[10] id 372.

[10a] See, for example, the list of cases cited by Mr. Justice Frankfurter in his dissenting opinion in *Baker v. Carr*, 369 U. S. 186, 286.

[10b] See government brief 25, fn. 12 and *supra* 42.

[11] Govt. br. 25.

[12] 369 U. S. 186 (1962).

self and on behalf of "others similarly situated." Here the petitioners allege that they "bring this action to redress the injury done them." (Pet. App. 5a.)

If it is not to be a "sweeping" injunction, but is to be limited to the particular need of the petitioners only, how is to be framed? An order merely enjoining the respondents from refusing to sell a house to the petitioners solely because of their race, would obviously be too vague to mean anything more than a commandment not to violate the petitioners' constitutional rights. To give it enough specificity, including, for example, an order requiring respondents to bring in a list of available lots, if the one selected by the petitioners has been sold, etc. as was attempted in the Colorado case[13] cited in the NACDH brief,[14] is bound to create the very question that was there raised and which we here raise, namely, "By what authority?"

Strangely enough, counsel on the NCADH brief seem to see in that Colorado case the answer to this question. Let us take a close look at it, for it is so relevant to the important point now under discussion.

The situation there was this: Colorado had enacted a "Fair Housing Act", under which was established an "Anti-Discrimination Commission." The Commission was empowered to issue an order against a violator of the Act "requiring such respondent to cease and desist from such unfair housing practice and **to take such other action as in the judgment of the Commission will effectuate the purposes of this article**" (Emphasis ours). The Commission in that case ordered the respondent to cease and desist **and** "to further effectuate the purposes" of the law it also

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[13] *Colorado Anti-Discrimination Commission v. Case,* 380 P. 2d 34 (Colo. 1962).

[14] At 88-89.

ordered him to do several other specific things, such as preparing a list of lots that were available in the same neighborhood, giving the complainants an opportunity to examine the list and select one for purchase, reporting to the Commission what steps were being taken to carry out its orders, etc.

Counsel quote some sentences from the opinion of the Supreme Court in that case indicating that to protect "a right which is truly 'inalienable'" the courts will, if necessary, "fashion a remedy."[15] But what counsel failed to note was that the Court there apparently did not agree that the right not to be discriminated against with respect to housing was so "inalienable" as to permit the legislature to delegate its power to provide specific remedies for violation of the Act. Such delegation, it said, would be "contrary to the separation of powers provision" of the state constitution."[16] It therefore ordered stricken all parts of the Commission's order except the general one "to cease and desist." The net effect of the Colorado decision was, in the words of an Ohio judge in a case involving constitutionality of Toledo's Fair Housing Ordinance, that "all of the relief sought by the complainant was therefore denied!"[17]

We join with counsel on the NCADH brief in calling attention to the view of the Colorado Supreme Court on the problem of the remedy in our case. We respectfully submit that to try to "fashion a remedy" here, out of the whole cloth of the Fourteenth Amendment, without even such statutory stitching as was present in the Colorado case, would be an impractical and questionable assumption of a legislative function.

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[15] ibid.

[16] 380 P. 2d 42.

[17] *Terry v. City of Toledo,* 194 N. E. (2) 877, 881 (1963); cf. also *Porter v. City of Oberlin,* 205 N. E. (2) 363, 370 (1963).

Moreover, here, as we have pointed out under Point I, C, the particular remedies asked for by the petitioners raise some special difficulties—even if they were to be limited in the manner suggested by the government.[3] For, in addition to the problem of devising an appropriate remedy, the Court will also be obliged to fix the limits of its holding, as in the case of Section 1982? How far is the prohibition against discrimination in "housing" to reach? If only to subdivisions, how big must they be? (Under St. Louis County regulations, a subdivision may be quite small, since there is no minimum acreage requirement,[4] and it need have no streets, parks, or any of the "community" features attributed to the respondents' subdivision). If not just subdivisions, what other kind of "housing"? Apartments? Flats? Single Residences? Rooms in residences? A log-cabin in the woods?

It would hardly be fitting, and we certainly have no desire, to engage in discussion as to the propriety in general of the Court's assumption of legislative functions. We are here concerned only with the narrow question as to whether such legislative functions should be exercised in a particular field, to-wit, discrimination in housing, **in the peculiar circumstances under which such exercise is requested in this particular case.**

We remind the Court that the Fourteenth Amendment has a section (5) which provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article," and in connection with it we recall the words of Mr. Justice Black, concurring in the Court's opinion in *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 278 (1964):

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[3] Govt. br. 25.

[4] See definition of "a subdivision of land", in "Subdivision Regulations", Govt. br. 71.

> The Fourteenth Amendment in and of itself, **without any implementation by a law passed by Congress,** does not bar racial discrimination in privately owned places of business in the absence of state action. (Emphasis ours.)

To this we add the following commentary from an article which is cited approvingly in the NCADH brief:

> [T]he framers and backers of the fourteenth amendment were primarily interested in enlarging the powers of the Congress, not those of the federal judiciary. . . . Piecemeal litigation is hardly an ideal method for the accomplishment of sweeping social reforms.[1]

Even more recently, the previously-quoted counsel on the NCADH brief expressed the same view in language so perfectly in accord with our own position that we are constrained to set forth his observations somewhat fully:

> Certainly there would be serious problems with respect to the self-acting aspect of the fourteenth amendment. If the courts were to hold that Section 1 by itself prohibits racial discrimination, they would have to apply that holding to all forms of discrimination or devise some limitation on its scope. The courts are not likely to embrace the first alternative, even assuming it would be desirable. The second is not impossible. The line could be drawn at action having a 'public effect.' . . . It could be drawn by balancing the benefits of privacy and freedom from governmental control. [Citing Justice Douglas in *Lombard v. Louisiana,* 373 U. S. 267, 274 and Williams, *The Twilight of State Action,* 41 Tex. L. R. 347, at 368.]

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[1] Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,* 73 Yale L. J. 1353, 1356, 1383 (1964).

> While courts are capable of this kind of agility, they are not as suited as legislatures. . . . As Professor Wechsler said in a closely related context, "I do not hesitate to say that I prefer to see the issues faced through legislation, where there is room for drawing lines that courts are not equipped to draw."[1] **The task could be left to the legislature by retaining the state action curb as to Section 1 of the amendment and abandoning it only as to Section 5. This approach, for which there is historical support, would have the effect of placing with Congress the responsibility of deciding just how far outside the traditional area of state action the ban on bias should be extended** (Emphasis ours).

As Mr. Justice Goldberg pointed out in his concurring opinion in *Bell v. Maryland*:

> In the give-and-take of the legislative process, Congress can fashion a law drawing the guide-lines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations.[2]

But not only would the courts' assumption of such a task involve "drawing lines that courts are not equipped to draw." In the circumstances of this case, and against the background of current congressional deliberation on a national fair housing law, we think it would be gravely

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[1] *Toward Neutral Principles of Constitutional Law,* 73 Harvard L. R. 1, 31 (1959).

[2] 378 U. S. 226, 317. Louis H. Pollak, dean of Yale Law School, expressed a similar view, when he testified at a Senate hearing last August on the 1967 Fair Housing Bill: "A general constitutional mandate of nondiscrimination is not a substitute for a precise code of procedure and remedies." Report of Hearings on S. 1358, 2114, and 2280, Before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency, U. S. Senate, 90th Cong., 1st Sess., at p. 162.

inappropriate. We respectfully refer the court to the admonitory words of Abraham Lincoln quoted at the end of our Summary of Argument.

CONCLUSION.

For the reasons herein set forth, the decision of the courts below should be affirmed.

EPILOGUE.

As this is being written word comes from an eminent Washington news correspondent[1] that passage by Congress of the currently proposed fair housing bill may now be "within sight." An important factor in getting the "few more necessary votes," according to this correspondent, is that the "fair-housing advocates have modified their proposal, substantially cutting back the scope of its coverage."

Can we say anything that will better illustrate our contention that the establishment of a remedy against discrimination in housing should be left to the flexible and democratic "give-and-take of the legislative process" rather than the courts?

Respectfully submitted,

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February 25, 1968.

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[1] James C. Millstone, in St. Louis Post-Dispatch, February 25, 1968.

JAN 24 1968 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

—v.—

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ST. LOUIS CIVIL LIBERTIES COMMITTEE

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IN THE

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE*

The American Civil Liberties Union and its affiliate, the St. Louis Civil Liberties Committee, are private, non-profit, membership corporations engaged solely in the defense of the Bill of Rights and the Civil War Amendments. Our interest in filing this brief is prompted by our belief that the Constitution prohibits the rank racial discrimination which is at issue in this case.

The ACLU opposes all housing discrimination based on race, creed, color, national origin, or political affiliation. One of the great principles of civil liberty—ranking with

* Petitioners have consented to the filing of this brief. Respondents' attorneys did not reply to movant's letter requesting consent.

due process, freedom of speech and religion—is that no man is to be treated on the basis of any group classification. This non-discriminatory treatment is most of all necessary in meeting the basic needs of food, clothing, and shelter. With regard to shelter, that necessity is growing as population, particularly in urban and suburban areas, is rapidly increasing.

In order to present these views in constitutional terms, we move for leave to file the attached brief.

Respectfully submitted,

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Attorney for Movant

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Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND THE ST. LOUIS CIVIL LIBERTIES COMMITTEE, AMICUS CURIAE

Interest of Amici

The interest of amici is set out in the motion for leave to file, *supra*.

Statement of the Case

According to the complaint, the allegations of which are deemed true for the purposes of this proceeding, the petitioners, responding to an advertisement in the *St. Louis*

Post-Dispatch, sought to purchase a house in the Paddock Woods subdivision, owned and developed by the Alfred H. Mayer Company. This subdivision, planned to house about a thousand persons, was part of a larger development planned for occupancy by about 2,700 families.

The developer refused to sell to the petitioners, husband and wife, on the sole ground that the petitioner-husband was a Negro and it was the developer's policy to exclude Negroes from the development.

Petitioners' suit against the developer and its real estate agent was dismissed by the District Court and the dismissal was affirmed by the Court of Appeals on the ground that no state action was involved in the discrimination and hence there was no violation of the Fourteenth Amendment.

Scope of This Brief

This brief is addressed to one question: whether the developer of what for all practical purposes is a residential community of 2,700 families (and hence more than 10,000 persons) may constitutionally bar the residents from associating with persons of a particular race.

ARGUMENT

I.

Feudal England, in its early stage, rested upon the sovereignty of land ownership. The lord of the manor exercised complete dominion over the manor. No one, not even the king, could enter without his consent. The serf or villein had no rights enforceable against the lord of

the manor. Until the development of the common law and the "law of the land" concept, it was prudence alone, and not right or justice, which impelled the lord generally to honor the "custom of the manor." 1 Trevelyan, *History of England,* 199-200 (1954).

Traditional feudalism disappeared long before the settlement of colonial America and America's frontier economy was hardly receptive to the manorial system. But more important, the freedom-loving individualists who declared their independence of England and established the Constitution could never have accepted the concept of sovereignty over human beings by reason of the ownership of the land on which they lived.

The twentieth century brought with it a new form of the feudal manor, the company town. The lord of the manor was a large, impersonal corporation rather than an individual, but the basic principle of sovereignty over persons by reason of ownership of the land on which they live was the same. Chickasaw, Alabama, had "all the characteristics of any other American town," with but one exception—the prevalence of notices reading: "This is Private Property." *Marsh* v. *Alabama,* 326 U. S. 501, 502-503 (1946).

In *Marsh,* the Court held that whatever economic dominion an owner might exercise over the land to which he has legal title, he could not close the gates to the Constitution. The "preservation of a free society," the Court said, "is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not without jeopardizing that vital individual freedom, prohibit door to door distribution

of literature." (*Ibid.*, p. 505.) "[I]t is clear," the Court continued, "That had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature." The Court answered in the negative the question, "Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?" (*Ibid.*)

It is important to note that while the plaintiff-protagonist in that controversy was a non-resident Jehovah's Witness who was forbidden to distribute religious literature to the inhabitants of the town, the emphasis of the Court's decision is on right of the inhabitants of the community to receive the literature, or perhaps even more accurately the safeguarding of a democratic community.

> Many people in the United States [the Court said] live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be properly informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen. (*Ibid.*, p. 508.)

The crux of the decision is found in the Court's statement at the conclusion of its opinion that the circumstance

that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental freedoms." (*Ibid.*)

Company towns of the Chickasaw type may be less prevalent today than they were in 1946, but it is certain that residential developments of the Paddock Woods type are more numerous than company towns ever were and are growing more numerous every day. Many millions of Americans today live in such developments. The Paddock Woods complex alone is planned for more than ten thousand inhabitants, equalling or surpassing in population hundreds of American cities. (The United States Census Bureau lists officially and the Post Office Department assigns Zip Code numbers to places, incorporated and unincorporated, of 2,500 or more population.) These developments, no less than the Chickasaw company town, are *de facto* municipalities, states within states. This is quite clear from the allegations of the complaint (deemed true for the purposes of this appeal):

> Defendants Alfred H. Mayer Company, Alfred Realty Company and Alfred H. Mayer have prepared or will prepare a deed embodying certain restrictions on the use of the property sold to individual buyers in said subdivision and on that land which common to all residents and have the same recorded along with the deeds delivered to those buying homes, and an association of the residents will be formed which will have the power to enforce these restrictions against owners of homes within the subdivision, through judicial recourse if necessary, which power is the equivalent

of the power to design and enforce zoning ordinances and the power to function as a municipal government generally. Community facilities and services will be provided and performed under the direction of a Board of Trustees appointed by Defendant Alfred H. Mayer, which will be granted the power to levy assessments, and to collect these assessments through judicial action in case of default, including the establishment of liens on properties located in said subdivision and to make contracts for the performance of the services for the benefit of Paddock Woods residents, which powers are equivalent to the function of a municipal government.

As Justice Frankfurter said in his concurring opinion in *Marsh* (at p. 510), "a company-owned town is a town." So too, we submit, is a company-owned development housing more than ten thousand individuals. The major difference between the Chickasaw-Paddock Woods type of community and the convertional American town or small city is that in the former, as in a feudal manor, principal governmental power is possessed and exercised by the proprietor rather than the people. But the fact that governmental power is centralized in an individual or corporation rather than dispersed among the governed is hardly any reason to exclude the latter from the umbrella of constitutional protection. If anything, the reverse should be the case. In the conventional municipality it would be the people themselves who would decide whether Jehovah's Witnesses should be permitted to distribute their literature among them. Residents wishing to be exposed to the ideas in the literature could utilize the usual democratic process of appealing to the community and persuading a majority

of the citizens of the correctness of their position. In Chickasaw-Paddock Woods this method is unavailable; the decision is made not by the people but for them. If, then, as the Court pointed out in *Marsh,* the majority of the people could not constitutionally censor what the minority reads or hears, certainly an individual proprietor cannot.

Property rights are important in our democratic system, but civil liberties are even more important. As the Court said in *Marsh* (at p. 509),

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. * * * In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties * * * .

"Title to property as defined by State law," said Justice Frankfurter (*ibid.,* p. 511) "controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations."

Marsh v. *Alabama* has never been overruled. On the contrary, it was recently heavily relied upon, and thus reaffirmed, in *Evans* v. *Newton,* 382 U. S. 296 (1966). In that case, the Court held that a park which differed from the

conventional municipal park only in that it was privately owned could not constitutionally exclude Negroes from entering on the same terms as whites. "A town," the Court said (at p. 299), "may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector. . . . [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."

The basic fact pattern in *Marsh* is not distinguishable from that presented in this case; factually there is no essential difference between Chickasaw and Paddock Woods. Both are communities of people within the United States and both, we submit, are subject to the constitutional principles that protect people living in American communities. The Gulf Shipbuilding Corporation could not withdraw Chickasaw from the United States and its Constitution; neither can the defendants withdraw Paddock Woods.

It is not material that *Marsh* dealt with the First Amendment right of freedom of speech and press whereas the present case deals with the Fourteenth Amendment freedom from racial discrimination. As we will shortly indicate, this case too deals with a First Amendment right; but even if it did not, the result should be the same. *Evans* v. *Newton, supra,* dealt with racial discrimination but the Court held *Marsh* applicable and determinative. The preferred position of constitutional freedoms in respect to property interests is not limited to First Amendment rights but extends to the right to equality secured by the Fourteenth Amendment. Footnote 4 in *United States* v. *Carolene*

Products Co., 304 U. S. 144, 151 (1938), is not limited to First Amendment freedoms. It specifically suggests that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." It was because of the superiority of racial equality over property rights in our hierarchy of democratic values that Abraham Lincoln issued the Emanicipation Proclamation taking from slave owners what the Court had held in *Dred Scott* v. *Sanford*, 19 How. 393, 450 (1857), to be their property of which they could not be deprived without due process of law.

Nor is it material that the plaintiff in *Marsh* sought only to distribute literature in the community, not to live there. Suppose Grace Marsh had been an employee of the Gulf Shipbuilding Corporation and wished to live in Chickasaw. Would the Court have sanctioned her exclusion solely because of her religious affiliation?

Exclusion of groups deemed inferior from the residential areas of the dominant groups has a long and ignoble history. It can be traced from the walled Jewish ghettoes of medieval Europe to the *apartheid* of contemporary South Africa. If Jehovah's Witnesses can be excluded from Chickasaw and Negroes from Paddock Woods, Catholics, Jews, persons of Asian descent, political radicals, paupers and any other socially, culturally, economically or politically identifiable groups can be excluded from other communities. The ultimate result could well be a country marked by a series of monolithic islands barred to all but white and Anglo-Saxon Protestants.

There was a time when our national legislative policy reflected such an exclusionary policy for the country as a whole. Persons of Chinese or Japanese descent could not enter the country at all; others, only on the basis of a national origins quota system whose purpose it was to exclude as far as possible non-Anglo Saxons. Fortunately, we have outgrown this mythology of racial superiority, and both Asian exclusion and the national origins quota system have been ended in the Immigration Act of 1965.

Because the plenary powers of Congress in the area of immigration were not subject to judicial scrutiny, this exclusionary policy was held immune from judicial challenge. *Chinese Exclusion Cases,* 130 U. S. 581 (1889). But where the Court has had jurisdiction, where the issue has been a citizen's right of residence, it has indicated a clear policy antagonistic to limitations on the right of Americans to live where they want to. Moreover, although no single rationale has evolved upon which to predicate this policy, there is no doubt that it is based upon constitutional principles.

Thus, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923), the Court included freedom to "establish a home" among the liberties guaranteed by the due process clause.

In *Buchanan* v. *Warley,* 245 U. S. 60 (1917), the Court, reflecting the constitutional policy of the time, somewhat artificially utilized property right concepts to invalidate an ordinance forbidding Negro occupation of residences in white neighborhoods.

In *Edwards* v. *California,* 314 U. S. 160 (1941), the Court was unanimous in its decision that the State of California

could not constitutionally exclude paupers from residing within its borders, although the Justices could not agree on a rationale upon which to base the decision. The majority of the Court, again somewhat artificially, used the Constitution's commerce clause to justify its determination. Mr. Justice Douglas, joined by Justices Black and Murphy, found it difficult to equate human beings with "cattle, fruit, steel and coal" (*ibid.*, p. 177) and invoked the privileges and immunities clause as basis for the Court's decision. Justice Jackson, in a separate opinion, reached the same conclusion. But what all members of the Court agreed upon was that economic and property considerations did not constitutionally sanction exclusion of poor persons from residing within the state.

In *Korematsu* v. *United States*, 323 U. S. 214 (1944), a divided Court upheld by reason of the compelling exigencies of war and the real possibility of enemy invasion the government's power to exclude persons of Japanese descent to reside on the Pacific coast. Even if this decision should be followed today, which is far from certain, its justification rests upon the paramountcy of national defense, not racial prejudice or even (as in the present case) profit-making motivations.

In *Housing Authority of Milwaukee* v. *Lawson*, 350 U. S. 882 (1955) the Court refused to review a decision by the Wisconsin Supreme Court (270 Wis. 269) holding unconstitutional a provision in the United States Housing Act (42 U. S. C. §141C) excluding from Federally financed housing persons who are members of organizations designated as subversive by the Attorney General.

Implicit in these decisions is a constitutional policy (which might even have echo in the Third Amendment)

of freedom of access to one's home and the place he seeks to make his home. This, we suggest, is a strong policy, sufficiently strong to subject to an exacting judicial scrutiny any claim that a particular proprietorship is so private that it immunizes from judicial interference a directly contrary exclusionary policy. This exacting judicial scrutiny is required not only because an important constitutional freedom is at stake but also because the victim of the deprivation is a member of a discrete and insular minority, a group for whose particular protection the Thirteenth and Fourteenth Amendments were adopted. *Slaughter-House Cases*, 16 Wall. 36, 71-72 (1873). This concurrence of the demands of freedom and equality would impose upon the courts an obligation of liberality in finding a constitutionally sufficient nexus between the exclusion and state action even where the discriminator and area of discrimination are small. Cf. *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Wickard* v. *Filburn*, 317 U. S. 111 (1942).[1] Where, as in the present case, the area of discrimination is a community of more than 10,000 population and the discriminator a *de facto* state within a state, even passive acquiescence by the state government should be sufficient, we submit, to invoke the courts' protective power under the Fourteenth Amendment.

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[1] *Katzenbach* v. *McClung* was an equality case in the guise of commerce, but *Wickard* v. *Filburn* was pure commerce. In that case the Court found a nexus between 239 bushels of wheat grown by a farmer for home consumption on the one hand and the flow of interstate commerce on the other sufficient to justify national jurisdiction. Should more be required where the interest seeking judicial protection is not commerce but a concurrence of freedom and equality?

II.

We submit that even if the exacting judicial scrutiny required in civil rights cases were limited to First Amendment freedoms it would be required in the present case. Freedom of association, we suggest, is involved in this case no less than racial equality.

Initially we note that the freedom of association secured by the First Amendment is not limited to political association. The free exercise of religion clause certainly protects freedom of religious association, but beyond that the Amendment guarantees freedom of other forms of association. *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449 (1958); *National Association for the Advancement of Colored People* v. *Button,* 371 U. S. 415 (1963). As the Court pointed out in *Griswold* v. *Connecticut,* 381 U. S. 479, 483 (1965), it has "protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." Other decisions of the Court have extended First Amendment protection to aesthetic and cultural expressions. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Kingsley Picture Corp.* v. *Regents,* 360 U. S. 684 (1959); cf. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Farrington* v. *Tokushige,* 273 U. S. 284 (1927). *Griswold* holds that so personal an association as that expressed in marital relations between husband and wife are within the penumbra of Bill of Rights protection. So, too, we submit is the right to live in a racially and religiously integrated community.

"We wanted a land," Mr. Justice Douglas has said, "where our people can be exposed to all the diverse creeds

and cultures of the world." *Dennis* v. *United States,* 341 U. S. 494, 585 (1951) (dissent). We want too a land whose communities are microcosms of that land and associate within themselves persons of diverse creeds, cultures and skin colors.

It has long been recognized that although the protagonist in a challenge based upon the First Amendment's guarantees of freedom of speech or press is the individual whose right to express himself has been restricted, no less a beneficiary of the suit and of the Amendment is the community which has been barred from hearing or reading what he has to say. As Professor Chafee noted:

> The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. Chafee, *Free Speech in the United States,* 33 (1941).

If a customs official excludes Ulysses from the United States,[2] or a postmaster deprives a magazine of its second class mailing privileges because of his dissatisfaction with its contents,[3] or if Congress places obstacles to the receipt of Communist propaganda from abroad,[4] it is the receiving public which is hurt, no less than the sending author.

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[2] *United States* v. *One Book Called Ulysses,* 5 F. Supp. 182 (1933) affirmed 72 F. (2d) 705 (1934).

[3] *Hannegan* v. *Esquire,* 327 U. S. 146 (1946).

[4] *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965).

Social scientists have found that racial segregation is harmful not only to the Negro minority but to the white majority as well.[5] If Paddock Woods has no Negroes in its houses and apartments, it will have no Negroes in its schools, churches, parks and playgrounds. Can it be doubted that the white children of Paddock Woods will suffer harm because of this isolation during the formative years of their lives from all contact with members of racial groups which make up a significant part of the American society? In *Sweatt* v. *Painter*, 339 U. S. 629 (1950), the Court held that Negro students who receive their law training in schools which are exclusively Negro are disadvantaged after admission to the bar because they must practice in a judicial system which reflects the racial complexion of the society of which it is a part. May not the same be said to be true in respect to white children raised and educated in an all-white community? In sum, may it not be that the white residents of Paddock Woods are being deprived of their right of association with non-whites, to the injury of themselves, their children and the values of American democracy?

If the Court should hold that the Civil Rights Act of 1866, 42 U. S. C. Sec. 1982, is not applicable in this case, it is no answer to the requirements of the Fourteenth Amendment to suggest that the remedy lies with the legislature. If, as we suggest, First Amendment freedoms are at issue in this case, the rights of neither the plaintiffs nor the residents of Paddock Woods can be curtailed by legislative inaction any more than they can be by legislative action.

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[5] Clark, *Prejudice and Your Child*, ch. 4 (1955); Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948).

As the Court said in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

The United States Congress submitted to the American people a constitutional amendment barring poll taxes in elections for Federal officials. It quite clearly refused to extend the prohibition to elections for state officials. Nevertheless, this Court, with but one Justice dissenting, held unconstitutional state poll tax laws applicable to elections for state offices. *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663 (1966). And even if this case did not involve a First Amendment freedom the result would be the same. In *Harper* the Court found it unnecessary to decide the case on First Amendment grounds and expressly decided it on the basis of the equal protection clause of the Fourteenth Amendment (*ibid.,* p. 685). If this Court should hold that Congress has not availed itself of the powers conferred by Section 5 of the Fourteenth Amendment, the courts nevertheless have a responsibility to give meaningful effect to the Amendment.

To assert that no white is required to live in Paddock Woods and if he wants to live in a multi-racial, multi-religious or multi-cultural community he can look for a

home or apartment elsewhere, is to invoke a legalistic fiction which has long been discarded. Cf. *Bailey* v. *Alabama*, 219 U. S. 219 (1911). It assumes that the owners of Paddock Woods and the individual seeking to buy a house there stand on equal footing and have equal bargaining power. This was the rationale underlying such obsolete freedom-of-contract cases as *Adair* v. *United States*, 208 U. S. 161 (1908) and *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923). Like jobs, "housing is a necessary of life," as Justice Holmes pointed out. *Block* v. *Hirsch*, 256 U. S. 135, 156 (1921). Persons employed in or near Paddock Woods may have little choice but to live there. This is not a case of a person excluded from a particular house or even a particular street because the owner or owners refuse to sell or rent to Negroes. What we have here is exclusion from an entire community planned for more than 10,000 persons of anyone who is himself a Negro or wishes to live in a community with other Americans irrespective of their color.

In *Martin* v. *Struthers*, 319 U. S. 141 (1943) the Court, in holding unconstitutional a city ordinance forbidding knocking on doors or ringing doorbells in order to distribute literature to home occupants, said (at pp. 148-149):

> • • • The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as whether distributors of literature may lawfully call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification

devices control the abuse of the privilege by criminals posing as canvassers. In any case the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the house.

The point of this case is that under the First Amendment the decision whether to receive or reject pamphlet distributors must be made by each individual for himself; it cannot constitutionally be made for him by those governing the community in which he lives. *Marsh* v. *Alabama* held that this principle is applicable even if the governors of the community are a single corporation or a single proprietor.

The same principle, we submit, is applicable here. One who does not wish to reside next door to a Negro family cannot constitutionally be compelled to do so. He has the right to check his prospective neighbors before he decides to purchase a house. But the decision is his own; it can no more be constitutionally made for him by a policy of the community to exclude Negroes than can a policy of the community to exclude Jehovah's Witnesses or the literature they distribute. Nor has he any right to demand that his disinclination to live in the same community with Negroes shall be translated into a general policy depriving less prejudiced persons of the freedom to associate with Americans of any color or creed.

CONCLUSION

In *Smith* v. *Allwright*, 321 U. S. 649 (1944) the Court held that where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a state agency and hence may not under the Fourteenth Amendment exclude Negroes from such elections. In *Terry* v. *Adams*, 345 U. S. 461 (1953) the Court refused to allow itself to be blinded to reality by the absence of any specific statute and recognized that in fact primaries are part of the election process even in the absence of any statute. In *Marsh* v. *Alabama*, *supra*, the Court recognized that a community is a community even if it is not legally incorporated as a municipality and that the Constitution does not because of that fact stop at its gates. Were a *de jure* municipality to have adopted the exclusionary policy of Paddock Woods there could be no doubt as to its unconstitutionality. *Buchanan* v. *Warley*, *supra*. We submit that in the present case as in *Terry* v. *Adams* and *Marsh* v. *Alabama*, the Court should recognize and give legal effect to the reality that the Paddock Woods complex is a *de facto* municipality subject to the mandates of the United States Constitution.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES,
Appellants,

v.

ALFRED H. MAYER COMPANY, CORPORATION, ET AL.,
Appellees.

MOTION AND BRIEF OF THE MARYLAND PETITION COMMITTEE, INC., OLIVER ELLSWORTH RUE, AND MARYLAND LOBBY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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MOTION OF THE MARYLAND PETITION COMMITTEE, INC., OLIVER ELLSWORTH RUE, AND MARYLAND LOBBY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Maryland Petition Committee, Inc., Oliver Ellsworth Rue, and Maryland Lobby respectfully move for leave to file the annexed Brief *Amicus Curiae* in this case. Appellants have replied that they are not granting any further permission for filing of briefs, and final word has not been received from the Appellees, in whose interest we are filing.

The Maryland Petition Committee, Inc., composed of Citizens, Voters, Taxpayers, Owners of real and other property, and Parents of children attending public schools, is interested in and will be objectively affected by the reversal of this case, with emphasis on members' Property Rights and Personal Right of Choice; Oliver Ellsworth Rue, real estate developer, is concerned for his interests and rights as a citizen and as a businessman, and similarly concerned are the members of Maryland Lobby, composed of a group

of citizens interested in preserving the American Constitution; wherefore these Petitioners desire to file a Brief *Amicus Curiae*, and in support thereof contend:

Firstly, that if the Fourteenth Amendment is a valid part of the Constitution, the Court is still without jurisdiction, as the State was not, as such, participating in any of the *alleged activities* of the Appellees;

Secondly, if the connections had with the Appellees are as alleged by the Appellants, they do not support this case, as the State did nothing in connection with the *conduct* of the business, *namely*, marketing of the products, etc., and, therefore, the cited activities do not come within the reach of the Fourteenth Amendment, or the Constitution otherwise;

Thirdly, that the right of choice in dealing with one's property should be preserved;

Fourthly, that religious liberty should be protected under the First Amendment; and

Fifthly, that the Fourteenth Amendment is an unconstitutional instrument.

The Movers therefore respectfully request leave to file a Brief *Amicus Curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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Appellees.

BRIEF AMICUS CURIAE OF THE MARYLAND PETITION COMMITTEE, INC., OLIVER ELLSWORTH RUE, REAL ESTATE DEVELOPER, AND MARYLAND LOBBY IN SUPPORT OF THE APPELLEES

STATEMENT

This Brief *Amicus Curiae* is submitted on behalf of the Maryland Petition Committee, Inc., Oliver Ellsworth Rue, and Maryland Lobby in accordance with Rule 42(3) of the Court's Rules and against the Appellants' position.

INTEREST OF THE AMICUS CURIAE

The Maryland Petition Committee is a corporation interested in Public Service and particularly in preserving local or State's Rights against the invasion thereof, of which the present case is one phase, and is composed variously of Citizens, Voters, Taxpayers, Property Owners, Business and Professional People, and Parents of Public school chil-

dren who all are interested in protecting their personal and business rights and property interests according to their judgment and feelings while allowing to all others the same rights as far as it can be done without imposing on the rights of others. The right to try is here afforded, but the right to try does not mean the right to force one's self on others or to obtain rights by imposition — the rights of Choice and Privacy are fundamentals of life.

Oliver Ellsworth Rue, real estate developer, is concerned in the issue of this case as a private citizen and as a businessman.

Maryland Lobby is a group of citizens interested in preserving the American Constitution.

Firstly, as to State Involvement, the contact of the State with the Appellees in no way involved the Fourteenth Amendment as long as nothing done by the State, affirmatively, in any way supported any alleged acts of the Appellees. There was no legal obligation to insert negatives or anticipate any potentially wrongful acts. No charter is obliged to make such negatives unless clearly obliged to do so by express law, and there is no express or even implied obligation to do so. For instance, the Supreme Court has rejected the loyalty oath preceding employment, a natural presumption of integrity existing.

Secondly, the State was in no way involved in Marketing, and there is no allegation or pretense of the State's having any contact with the Appellees in connection with the *marketing* of their products or affirmatively authorizing or approving the practices alleged. Even the *Skelley v. Kramer* case, 334 U.S. 1, said that covenants were valid even though not enforceable in the Courts, yet we have *U. S. v. Guest,* 383 U.S. 745, by escalation. The Amendment contemplates that individuals in their dealings are not

amenable to the Amendment. Corporations under that Amendment have many rights of individuals — so held a long time ago by this Court. These Appellees had a right to conduct their business successfully and as common sense and prudence directed, if not interdicted by some positive or other recognized law, and we contend that there was nothing extant to prevent them from conducting their business as business judgment and everyday common sense dictated, and the necessity of the use of their current methods is now a matter of *everyday* knowledge and *common sense* if one expects to be successful. The fleeing of the mass of the white people from the cities is incontrovertible proof of the wisdom of this business judgment.

The *cities* are palpable and very vocal witnesses to the common sense and good judgment of the Appellees if they wanted to have a successful project. One element is trying to impose or force itself, and now by law, on others in deprivation of their Right of Choice in their associations and way of life. Opportunity means the right to try — to "pursue" (Declaration of Independence) — and not to force one's self on others in such conditions as here presented — and that is all the Appellants are entitled to, as against the Appellees. Good manners, even, as a rule, prevent people from pushing themselves where they are not welcome or acceptable, although good manners today seem not to be as prevalent as in days past. Private Clubs will be next.

Nonaction of the State is not action. The Fourteenth Amendment contemplates action *only*. The most that can be said is that the State assisted in *creating* the agency of business, and after that the business was run as any intelligent Person would run it if he expected to be successful, and it was run intelligently under the known conditions of the times and circumstances, which is a matter for Judicial notice in view of the great mess now existing.

Thirdly, as to Right of Choice in dealing with his property, one has the right to act on choice, a fundamental element of life. When such notice is filched from him, the levelling off is a long step to Communistic control. *Now,* one's property may be taken away from him to enable development by *others* in the allegedly public interest — a long step on the way in the escalation. There now seems to be no end to the escalation of the Federal government, though some lower courts have stepped in where they can act with respect to this Court, as here, which Decisions we are urgently supporting.

Fourthly, as to the application of the First Amendment, Religion creates one of the stronger of human feelings, and as the Court has said that there is a *wall* between Religion and the Government, and there are many of strong Religious Belief who believe that according to Holy Writ there is a *wall* between the antipodal Races, in support of this view the following citations are made:

> *Jude* 7 "Even as Sodom and Gomorrah, and the cities about them in like manner, giving themselves over to fornication, and going after *strange* flesh, are set forth for an example, suffering the vengeance of eternal fire." (Emphasis supplied.)
>
> *Hosea* 5:6-7 "And they shall go with their flocks and with their herds to seek the Lord; but they shall not find him; he hath withdrawn himself from them. They have dealt treacherously against the Lord: for they have begotten *strange* children . . . " (Emphasis supplied.)

Other *Bible* citations include *Proverbs* 22:14, *Psalms* 144:11-12, *Jeremiah* 2:21-26, and *Proverbs* 23:27.

The well known views of the Founders of the two Leading Political Parties, Presidents *Jefferson* and *Lincoln,* are *in accord* with the above feelings and beliefs in that they

were both for the Separation of these two Races, and their views are too well known to require quotation or citation; and the End Result to the two Races has been Publicly Expressed by the two current leading English speaking Historians, Nevins and Toynbee: *U. S. News & World Report,* November 14, 1958 and May 10, 1965, respectively — both to the effect that complete Integration in America will lead to complete Amalgamation of the Races. Indices supporting them are such as the recent Rusk and Canadian Cabinet Minister Families, and in their shadow is the case of Marshall Field's Family, aside from the everyday experience of "The Man on the Street". The End Result is indisputable to anyone with the *vision* referred to in the *Book of Proverbs,* and we now respectfully challenge the refutation of these four competent witnesses. This Position does not, or at least does not necessarily, involve *Hatred* or any question of who is *better* than whom. It is merely a case of *Birds of a Feather Flocking together; Like* being with *Like* and wanting to Preserve their *God-created* difference. These Truths are too well known to require laboring, and are now placed before the Court. In the spirit and interest of such People we urgently present this Point. The Cold and Palpable truth is the Fear, as indicated by Jefferson and Lincoln, now on view of History, as they understood History, and as Nevins and Toynbee now understand it, is the repulsion of the thought of the Murder-Suicide of the White Race — the Physical mixing of the Races, *a là* Ruskitis et al. That is the *real backbone of the Problem,* and the difficulty of getting united action is the truth of Hamilton's Remark in the *Federalist,* Article 27: "A thing that rarely strikes the senses generally has little influence on the mind." The current reaction shows the truth of that Remark. Those who because of their religious feelings do not want to be deprived of their God-given right to remain as He created them, wish to go along with

the two Presidents on Race Preservation and homogeneity, and in so doing are in good company. They therefore object to being deprived of their rights under the First Amendment.

THE FOURTEENTH AMENDMENT IS INVALID

Fifthly, now some, in order to impose themselves on others and on their property rights, and to control others (interfering in their efforts for the successful conduct of their businesses), resort to the law, and some specifically bring forward the Fourteenth Amendment to that end and purpose; to which our answer is that said Amendment is not legally a part of the Constitution, as it was never *proposed* by the House or *ratified* in accordance with the requirement of Article V thereof, as the vote of the House was 120 out of 184 (of even that Rump Congress), and the alleged ratification of the States was obtained only by a process in conflict therewith: seven Southern States, having been accepted to ratify the *Thirteenth* Amendment a short time before, were rejected when they, along with the other Southern States, rejected the Fourteenth Amendment, and, by intervening *Resolution*, vetoed by the President, these Recognized States were told that they would not be recognized *again* until they had voted to ratify the Fourteenth Amendment; and to effect their will the military was put in full power all over the South. Such was the pretended ratification thereof as proclaimed by the Secretary. In the meantime, New Jersey and Ohio had reversed their vote of ratification before the necessary two-thirds had been obtained, and yet they were counted as necessary to ratification, as shown by the Secretary's Proclamation. California and Oregon failed to ratify. Therefore we contend that the Amendment failed.

As far as has been determined, the Supreme Court has never construed the said Article V from the Four Corners of the Constitution, the true Rule of construction in the instant case being a proposal by "two thirds of both Houses", whereas the Fourteenth Amendment was actually proposed by only two-thirds of those *present*. Congress, when proposing Amendments, is acting extra-curricularly, not legislatively, and so, when it is engaged in *impeachments* and *treaty-making*, in such case the word "present" is subjoined to "two-thirds". Another instance of such use is in connection with recording the Yea and Nay votes: "one fifth of those Present" (Art. I, Sec. 5(3)). Therefore, when the Founding Fathers meant *Present* they said "Present". That view, it may be said, has been used more explicitly during the past year by Retired Justice Whittaker in a speech in Washington, D. C., *namely*, two-thirds of the *"elected"* members. That, beyond all reasonable argument, is the true construction, *Expressio unius est exclusio alterius* being the true and controlling rule of interpretation in such cases.

Laches is pleaded in some cases and will doubtless be so pleaded here, but it is unavailing against the Constitution, as "However the Court may interpret the Provisions of the Constitution, it is the Constitution which is the law and not the decisions of the Courts." — Charles Warren's *The Supreme Court in the United States History*. See also Storey Cowley and this Court's holdings, all well known. *U. S. v. Gugel*, 119 F. Supp. 897, and *U. S. v. Assn. of Citizens Councils*, 187 F. Supp. 846, and *Leser v. J. M. Garnett*, 258 U.S. at 136. Time does not cure a wrong against the Constitution as it may do in Private litigation.

In summation, we contend

1. That the actions of the State in the matter were not such connections as to support the Appellants' conclusions,

2. That particularly in relation to the matter of the *marketing* of the property, this was a distinct business act with which the State had nothing to do,

3. That the right of choice in dealing with one's property should be preserved,

4. That religious liberty should be protected under the First Amendment, and

5. That the Fourteenth Amendment is an unconstitutional instrument.

SOME PERTINENT CASES AND COMMENTS

The Fourteenth Amendment caused this Comment years ago by Justice Holmes:

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the Constitutional rights of the States. As the decisions now stand, *I see hardly any limit but the sky to the invading of those rights if they happen to strike a majority of this Court for any reason to be undesirable.*" *Int. Shoe Co. v. Washington,* 326 U.S. 310, 327.

Former Solicitor General Beck, in *The Vanishing Rights of the States,* makes an extended pertinent Comment on this subject and says "How difficult it is for" the creators of an instrument or document to prevent those of the future from "stooping to a . . . misconstruction" of their purpose, and even explicit language.

Hamilton understood, as did all the Founding Fathers, that

> "There is sufficient diversity in the State of *property,* in the *genius, manners, and habits of the people of the different parts of the Union, to occasion a material diversity of disposition in their representatives to-*

wards the different ranks and conditions of society. And though an intimate intercourse under the same government will promote a gradual assimilation in some of these respects yet there are causes, as well *physical* as moral, which may, in a greater or less degree, permanently nourish different propensities and inclinations in this respect." Federalist, Art. 60.

The Court in *Ullman v. U. S.*, 350 U.S. 422 433, quoting the lower Court, said,

> "Indeed, the Court has stated that words may be 'strained' in the candid service of avoiding a serious Constitutional doubt", citing *U. S. v. Rumely,* 345 U.S. 41, 47,

and quoting the C.C.A. Judge in *Maffie v. U. S.*, 209 F. 2d 225, 227, further said,

> "Nothing *new* can be put into the Constitution except through the amending process. *Nothing old can be taken out without the same process.*"

The advantage of local State Control, as said by Justice Brandeis in the *New State Ice Case,* 332 U.S. 392, and quoted by Justice Jackson in *Power Commission v. East Ohio Gas Co.,* 338 U.S. 464, 488, follows:

> "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without the risk of the Country."

In dealing with a pertinent subject in *Western Union v. Lenroot,* 323 U.S. 490, 528, the Court spoke thus:

> "But if it (Congress) determined to reach this employment, *we do not think it would have done so by artifice* in preference to *plain terms.* It is admitted that it is beyond the *Judicial power of innovation to supply a direct prohibition by construction,*"

and that

> "We think that we should not try to reach the *same result by a series of interpretations so far fetched and forced* as to bring *into question the candor of Congress* as well as the *integrity of the interpretation process*,"

and the Court in *U. S. v. Rabinowitz*, 339 U.S. 85, 58, remarked that

> "*Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that the law is the expression of chance* — for instance, of *unexpected changes* in the Court's composition and the contingencies in the choice of successors."

The process of escalating is expressed in *U. S. v. Zucca*, 351 U.S. 91, 100, as "a *creeping one* rather than one that proceeds at full gallop."

Circuit Court Judge Sobeloff, as Solicitor General, explained this Process in this way, as told by the Baltimore *Sun* of December 14, 1954:

> "The Supreme Court, he said, *is not only the adjudicator of legal questions*, but 'in many instances is the final formulator of *national policy*.'
>
> "The example he offered of the court's policy-making function was the decision last May in which the court ruled school segregation unconstitutional.
>
> "Like Congress, or any *other policy-making body*, the court *chooses the appropriate time* to decide important questions, he said.
>
> " 'For example, for several years before taking the school segregation cases the court *repeatedly turned away opportunities to decide questions in that area*. . . .'
>
> "And lately, the court *declined to review a ruling on segregation in public housing*, 'perhaps' Mr. Sobeloff said, '*because the court thought it best, after deciding*

the school cases, not to say more about other aspects of segregation at this time.'

"The *question of timing,* especially in cases involving political controversy, 'can be of supreme importance' to the court."

He also made a pertinent remark in the American Bar Journal, in referring to "hard cases". He said that a government lawyer was telling him "with a show of shock and dismay that in a certain case Judge Parker declared from the Bench, *'Well, if that is the law, any judge worth his salt will find some way to overcome it.'"* (Emphasis supplied.)

Reference here could well be made to Justice Roberts' dissent in *Smith v. Allright,* 321 U.S. 649, 669, a Texas Negro voting rights case.

If the Constitution is to be treated as flexible to meet the times, the Court in *Davis Co. v. Penna. Co.,* 337 Pa. 456, declared that

"... the law would become the *mere football* of the *successively changing personnel* of the Court and 'the known certainty of the law' which Lord Coke so wisely said 'is the safety', would be utterly destroyed." (Emphasis supplied.)

From the Preceding History and the cases, the "Changed Court" gave the Fourteenth Amendment another "twist" when it decided the School cases, it overruled the Supreme Court opinion in the *Plessy Case,* and it has served as a "Bellwether" for other angles. In *McCabe v. Santa Fe Ry. Co.,* 225 U.S. 151, the Court had said,

"It has been *decided* by this Court, so that *the question could no longer be considered an open one, that it is not an infraction* of the 14th Amendment for a *State to require separate but equal accommodations* for the races."

and we Conclude, for sake of Brevity, by quoting from *Barbier v. Connally*, 113 U.S. 31, preceding the *Plessy Case*, where Justice Field declared that

> *"Neither the Amendment — broad and comprehensive as it is nor any Amendment, was designed to interfere with the power of the State — sometimes termed its police power — to regulate and promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."* (1885).

We are aware, of course, of the twist and turns of the cases as analysed in the opinion of the lower Court.

CONCLUSION

The decision of the lower court should be sustained on the grounds set forth by it, and if not, then on the grounds herein set forth, aside from any others.

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

vs.

ALFRED H. MAYER COMPANY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CITY OF KANSAS CITY, STATE OF MISSOURI, AND THE CITY OF KANSAS CITY, STATE OF KANSAS, AS AMICI CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

vs.

ALFRED H. MAYER COMPANY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CITY OF KANSAS CITY, STATE OF MISSOURI, AND THE CITY OF KANSAS CITY, STATE OF KANSAS, AS AMICI CURIAE

OPINIONS BELOW

The judgment of the Circuit Court of Appeals (Ptrs'. App. 42a) was entered on June 26, 1967, and its opinion (Ptrs'. App. 43a is reported at 379 F. 2d 33. The order of the United States District Court for the Eastern District of

Missouri dismissing petitioners' first amended complaint (Ptrs'. App. 43a) is reported at 379 F. 2d 33. The order of entered May 18, 1966 and its memorandum opinion (Ptrs'. App. 15a) is reported at 225 F. Supp. 115.

JURISDICTION

On December 4, 1967 this Court granted petitioners' petition for writ of certiorari to the court of appeals, and the jurisdiction of this Court is vested pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution

The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

The Fourteenth Amendment provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutes

Section 1978 of the Revised Statutes (42 U.S.C. 1982) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

QUESTIONS PRESENTED

1. Whether Section 1978 of the Revised Statutes prohibits developers of a large suburban residential community from refusing to sell homes therein to Negroes solely by reason of their race or color.

2. Whether such a general policy of discrimination solely on the basis of race or color followed in the development of and the sale of homes in residential subdivisions falls within the prohibitive scope of and therefore violates the Fourteenth Amendment.

3. Whether such racially discriminatory policies and the establishment of racially segregated communities are prohibited by and therefore violate the Thirteenth Amendment.

STATEMENT OF THE CASE

The Court issued its writ of certiorari to the Court of Appeals for the Eighth Circuit, which court affirmed (Ptrs'. App. 42) the district court in sustaining (Ptrs'. App. 14) the respondents' motion to dismiss the petition which alleged unlawful and unconstitutional discrimination

against the petitioners by refusing to sell them a home in the suburban community of Paddock Woods in St. Louis County, Missouri (Ptrs'. App. 3-13). The district court in taking such action held the discriminatory policy of respondents to be merely private discrimination by persons and corporations engaged in a purely private and local enterprise, and which discrimination was not therefore proscribed by either the 14th Amendment or Section 1978 of the Revised Statutes (42 U.S.C. 1982) (Ptrs'. App. 18-41).

Without further repetition of the facts, amici would adopt the statements of the case as set forth in the brief for petitioners at pages 5-8 and the brief filed herein on behalf of the United States as amicus curiae at pages 3-6.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the City of Kansas City of the State of Missouri, and the City of Kansas City of the State of Kansas, which are political subdivisions of the states within which they are located, and as such, possess broad and exclusive police power, and are charged with the grave responsibility of promoting the health and safety, morals, prosperity, property and general welfare of their inhabitants.

The City of Kansas City, Missouri is a municipal corporation of the state organized under a constitutional charter adopted in 1925 pursuant to authority granted by the Constitution of the State of Missouri and pursuant to which it possesses broad and exclusive home rule powers.[1]

1. City of Kansas City, Missouri, adopted its first constitutional charter in the year 1875, thereby exercising a home rule charter form of government pursuant to Article IX, Section 16, Constitution of the State of Missouri, 1875, as amended.

The City of Kansas City, Kansas is a municipal corporation of the state by virtue of Section 5, Article XII of the Constitution of the State of Kansas, 1859; pursuant to an amendment in 1961 of said Section of the Constitution it was granted authority to exercise home-rule powers by charter ordinances.

The City of Kansas City, Missouri has a manager, council form of government, and the City of Kansas City, Kansas is a first-class city of the state with a mayor-commission form of government.

This cause presents to the Court the issue as to whether or not a so-called "private" developer of land and property is, in exercising his right to plat, subdivide, develop and sell land and homes pursuant to state and local regulations and restrictions, subject to the prohibition allegations contained in the federal constitutional and statutory prohibitions against discrimination based solely on race or color. Inasmuch as in the exercise of their police power the amici herein are deeply concerned and affected by the subdivision and development of land, including residential subdivisions, they are acutely interested in this cause. Subdivision of and development of land and residential property is recognized to be substantially affected with the "public interest", as demonstrated by statutory authority to provide through subdivision regulations and restrictions for coordinated street layouts, adequate and convenient open spaces for traffic, utilities, access of firefighting apparatus, recreation, light, air and avoidance of population congestion.[2] The improvement

2. The importance of coordinated development of lands in metropolitan areas or regions in order to promote and protect the general welfare, health, safety and prosperity of the inhabitants of the communities is evidenced by the enactment of laws to allow joint cooperation in area planning throughout the metropolitan areas to be exercised by metropolitan planning com-

of real property, the subdivision of land, the use and occupancy of premises and the erection of buildings all have been universally recognized as affected with such public interest and concern to justify and require the imposition of regulations, prohibitions and restrictions, by zoning laws and subdivision regulations; all for the purpose of promoting and protecting the health, safety, morals and general welfare of the community in general, and its citizens in particular. It is in the recognition of such underlying public concern that cities such as Kansas City, Missouri and Kansas City, Kansas have been empowered to enact its zoning laws and subdivision regulations.[3]

Residential subdivision development is directly and substantially related to the public function fulfilled by the control and enforcement of the zoning laws and subdivision regulations, which are primarily intended to provide for the harmonious, convenient, efficient and economic development of the city and the welfare of its inhabitants.[4] Platting and subdivision of lands within the municipalities must be "made according to the general law of the state",[5]

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missions. Chapter 12, Article VII, Section 12-705, General Statutes of Kansas, K.S.A., 1963; Chapter 12, Article VII, Section 12-716, et seq.; General Statutes of Kansas, enacted L. 1957, Chapter 101, Section 1-6.

3. Chapter 65, Section A, Revised Ordinances of Kansas City, Missouri, 1956, as amended, January 1, 1963; The City of Kansas City, Missouri, is empowered by Section 1(55), Article I of its constitutional Charter, 1925, as amended to ": . . divide the city into districts and for each of such districts to impose regulations, restrictions, or prohibitions designed to promote the public health, safety, convenience, comfort, morals, prosperity and general welfare, governing the erection of buildings and other structures and of premises to be used for trade, industry, residence or specified purposes; . . . regulating building lines and limiting the percentage of lot occupancy and regulating and limiting the area of courts and other spaces. . . ."

4. Chapter 13, Article I, pp. 11, 15, Sections 1301, 13-1109-1111, 13-1501, General Statutes of Kansas, K.S.A., 1963.

5. Article XI, Section 359, Constitutional Charter of Kansas City, 1925, as amended.

approved by the city plan commission and the director of public works and accepted by the council of the city in order that it have full effect and validity.[6] Subdivision plats and development plans are required to provide for the dedication to public use of streets, alleys, public highways, as well as easements, public utilities, all of which are subjected to the exclusive control of the city.[7] The city plan commission of the City of Kansas City is further granted the exclusive power to prepare and recommend plans of all facets of planning, zoning, platting and subdivision of lands for development and residential use.[8]

The amici-municipal corporations have officially been directly concerned and interested in the complete freedom and liberty of its citizens as granted and guaranteed by the Constitution of the United States and the constitutions of their states, and have been active through their legislative bodies in prohibiting discrimination on account of race or color by the enactment, pursuant to their police powers, of "civil rights" legislation. Both municipalities

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6. Article XI, Section 360, Ibid.

7. Article XI, Section 362, Ibid.

8. See Appendix, page A9; Article XIV, Sections 400-401, Charter of Kansas City, 1925, as amended.

Platting and subdivision of lands is strictly controlled and regulated by the code of general ordinances of Kansas City, Missouri, pursuant to its police power and is likewise affected with public interest and public function. No building permits may be issued, no subdivision plat validly recorded and no lots or lands sold in subdivisions, traded or conveyed except that the development strictly comply and qualify under the subdivision regulations and zoning laws of the city; Sections 31.15-31.14, Article II and Sections 31.4-31.5, Article I, Chapter 31, Code of General Ordinances of Kansas City, Missouri, as amended. See Appendix A4-A5. Subdivision regulations thereafter contained 29 sections providing for minimum design standards for blocks, streets, lots, rights of ways, side yards and frontages, setbacks, layouts, public utility easements, parks and other open spaces.

have enacted public accommodations legislation and have adopted fair housing acts.[9]

The fundamental purposes to be fulfilled by this legislation is indicative of the interest of these amici in this cause. The Board of Commissioners of the City of Kansas City, Kansas, in enacting its fair housing ordinance "declared (it) to be the policy of the city . . . to bring about good, wholesome and decent housing accommodations through fair and lawful adjustment procedures and penalties for violators who deny any person the opportunity to enjoy said housing accommodations on account of race, religion, national origin, or ancestry."[10] The city council of the City of Kansas City, Missouri, announced its policy by preceding its fair housing act provisions with a preamble declaring "that racial prejudice and bigotry and the discrimination and disorder occasioned thereby threatened not only the rights and privileges of its inhabitants, but are injurious to public morale, safety and the general welfare; and to the end that such prejudices and bigotry shall be reduced or eliminated".[11]

9. The Council of Kansas City, Missouri, enacted a "public accommodations" ordinance on July 15, 1960. On July 21, 1967, it enacted by ordinance a "fair housing" act, Appendix A1, which made it unlawful for any real estate broker, salesman or employee, bank, money lending, credit securing or other financial institution to effect or commit a discrimination with respect to prospective transfer or transfer of any interest in housing accommodations.

10. Ordinance No. 46565, an ordinance relating to discrimination in housing, section 1, enacted September 7, 1967. Appendix A4.

11. Committee Substitute for Ordinance 32546, as amended, enacted July 21, 1967. The declaration of policy is expressly set forth in Section 39.271 of the fair housing act and provides: "It is hereby declared to be the public policy of the City of Kansas City to bring about, through fair and lawful adjustment procedures and infliction of lawful punishment upon recalcitrant violators, the opportunity for each natural person to enjoy, as far as his individual capacity and ability permits, good, wholesome, and decent housing accommodations, without regard for his race, religion, national origin or ancestry."

Although this type of legislation is unquestionably a constitutional and valid exercise of the police power vested in these cities as local governments or municipal corporations through the delegation of the state police power, they are necessarily limited in their impact and effectiveness by reason of local jurisdictional boundaries, which is of particular and crucial importance in large metropolitan areas such as Kansas City and St. Louis. As of 1960, Kansas City Metropolitan Area had a total population of 1,039,493. Of this total, the population of the City of Kansas City, Kansas, was 121,901, 23.1 percent of which is Negro; and of the City of Kansas City, Missouri, 475,539, 17.5 percent of which is Negro. The demographical statistics bespeak of discrimination and segregation in suburban residential housing and of the limited impact and effect of legislation of fair housing acts by the urban center municipalities.

The City of Kansas City, Missouri, is situated in three counties of the State of Missouri: Jackson County, Clay County and Platte County; and the largest portion of the City's population lies, however, within Jackson County. Clay County has a total population of 87,474 and Platte County population is 23,350 and would be generally described as lying outside the center city. It is not to be unexpected that Clay County should have a Negro population of 0.8 percent and Platte County a Negro population of

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"It is further declared that this grounded upon a recognition of the unalienable right of each natural person to provide for himself and his family, a place of abode according to his own choosing and as sufficient as his individual talents, industry, and circumstances permit, and respecting the identical right of other natural persons; and, further, that the denial of such right through consideration solely based upon race, religion, national origin or ancestry is detrimental to the health, safety and welfare of the inhabitants of the City of Kansas City and constitutes an unjust denial or deprivation of such unalienable right which is properly within the power of government to prevent. . . ." The fair housing act of the City of Kansas City, Missouri, is set forth in the appendix at pages A1-A3.

1.2 percent; a substantial contrast to the 13.5 percent Negro population within the boundaries of Jackson County, which has a total population of 622,732, and the 17.5 percent Negro population of Kansas City, Missouri.

On the other side of the state line, the metropolitan portions of Kansas City SMSA are situated primarily in the counties of Johnson and Wyandotte. Although Kansas City, Kansas, as it has been noted, has a 23.1 percent Negro population, the County of Wyandotte on the whole, within which Kansas City, Kansas, is situated has a Negro proportionate population of only 16.7 percent, although it is substantially larger in total population than the City of Kansas City, Kansas; Wyandotte County having a total of 185,495. In shocking contrast, the County of Johnson, which has a 476 square mile area and a total population of 143,792, has a proportionate Negro population of 0.7 percent. The County of Johnson has some 15 municipalities within its suburban residential area, the largest of which is Prairie Village, Kansas, with a population of 25,356 in a six square mile area. It has a proportionate Negro population of 0.1 percent.[12]

The conclusion to be drawn from this empirical data would seem to be obvious. The City of Kansas City, Kan-

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12. Mention should be made as to the income characteristics of portions of the Kansas City Metropolitan Area. The 124,591 families in Kansas City, Missouri, had in 1959 a median income of $5,906; 17.6 percent of the families had an income under $3,000. The 31,880 families in Kansas City, Kansas, had a median income of $5,583; 18.1 percent had an income under $3,000. These statistics are in sharp contrast to those for the suburban areas: Johnson County, Kansas, had within its area 37,915 families with a median income of $8,161; only 7.2 percent had a median income under $3,000. Jackson County, Missouri, with 164,169 families who have a median income of $6,028 with 15.9 percent having an income under $3,000.

All statistics referred to herein are based on United States Bureau of Census, United States Census of population: 1960, general population characteristics and general, social and economic characteristics for the states of Missouri and Kansas.

sas, and the City of Kansas City, Missouri, within which the majority of the total population of the metropolitan area and 111,378 Negroes out of a total metropolitan Negro population of 118,502 reside, have only limited jurisdiction and control by enactment of "civil rights" legislation over the majority of the metropolitan area; little, if any, over the areas typically classified as "suburban". Recognizing the impact of this empirical data and giving full effect to sheer statistics placed within an historical context, the amici curiae do hereby recognize that the preservation and protection of the civil, legal rights of its inhabitants and the citizens residing in the Kansas City Metropolitan Area must ultimately rely on the applications of the theories and doctrines presented to this Court by the issues involved in this cause; notwithstanding the recognition of the fundamental principles and the crucial problems underlying the entire subject matter of discrimination in housing accommodations on the basis of race or color as set forth in policy declarations hereinbefore referred to when these two local governments enacted their "civil rights" legislation.[13] In addition to the restrictions arising by reason of their local jurisdictional boundaries, there remains the power vested in their electorate to exercise the right of referendum to appeal such local legislation.

13. The increase in proportion of Negroes in major urban centers is a widely and universally recognized nationwide trend. Leo F. Schnore, The Urban Scene; Human Ecology and Demography (New York: Free Press, 1965). The author commented that "without exception, these 50 metropolitan centers (50 largest cities in the continental United States), regardless of their regional location, show increases in the proportion non-white." Ibid., page 257. The author further described the modal pattern of development in the following way: ". . . Both whites and non-whites are leaving the very core of the central city . . . while the non-white residents are accumulating there very rapidly; the outer zone of the central city is adding to its white population at a much reduced rate; the suburban ring is drawing at an extremely fast rate . . .; in absolute numbers almost all of the total increase in the (suburban) ring is the result of additions to the white populations. . . ." Ibid., page 276.

Although dedicated to the preservation and protection of the fundamental civil rights of their inhabitants, as citizens of the United States, and as prescribed and guaranteed them by the Constitution of the United States, the power and jurisdiction of these local governments are necessarily limited and restricted. It is in the context of this dilemma that the amici curiae, cities of Kansas City, Missouri and Kansas City, Kansas, present this brief in support of the petitioners in this cause

SUMMARY OF ARGUMENT

I

Section 1978 of the Revised Statutes (42 U.S.C. 1982) finds its legislative source in the Civil Rights Act of 1866, and its plain object and intent is to guarantee to all citizens, and by reason of its historical context in particular non-whites, full and equal rights to acquire, own and enjoy real property. Although the direct constitutional source of congressional power to enact the said statute may be open to debate, the constitutional context within which the statutory guarantee was established remains unequivocally to be the adoption of the 13th and 14th Amendments to the Constitution.

The general policy of developing racially segregated residential communities by discriminatorily refusing to sell residential property to members of the Negro race is expressly prohibited by Section 1978, when the said statute is examined in light of its constitutional and legislative history; notwithstanding, respondents may or may not be acting within the scope of "state action", such statute having not been limited by its express terms to the States or persons acting pursuant to state powers or in the context of state enforcement or participation.

II

The 14th Amendment guarantees to all citizens the fundamental civil right to acquire, own, enjoy and dispose of real property without discrimination by reason of race or color, and any such discrimination is prohibited by the equal protection of the laws clause. The 14th Amendment is addressed directly to the states, but likewise recognized as applying to private individuals or corporations whose discriminatory acts or conduct are committed while exercising the state powers or functions, or when encouraged by the state or the state becomes involved or participates in some manner in their otherwise private activities or enterprises.

The platting, subdivision and development of private lands into large residential communities is substantially intermingled with the exercise by the states or their political subdivisions of their broad police powers in regulating, controlling and limiting such activities or enterprises. The subdivision of lands and the development of such residential communities has a direct impact on the public interest by reason of the size and complexity of the modern society and the large metropolitan areas which now exist, and are therefore sufficiently brought within the area of public domain. Giving full recognition to this undeniable conclusion, which amici contend has been universally accepted, and considering the other aspects relating to the regulation and licensing of private individuals and corporations by the states and local governments, the states and local political subdivisions have become so involved in the entire subject matter of zoning and subdivision development that broad and general policies of racial segregation in the same fall within the prohibitive scope of the 14th Amendment.

In addition thereto, or in the alternative, amici would contend that persons who are denied equal treatment solely by reason of race or color in the acquisition and enjoyment of property in segregated residential subdivisions or communities are deprived of the equal protection of the laws directly by the state. The state's inaction or omission indirectly permits and encourages the development of racially segregated communities resulting from the state's so-called "neutral" discrimination policy, and does thereby violate by such inaction the 14th Amendment.

III

The development of racially segregated communities by the discriminatory policies of racial exclusion followed by private subdevelopers and real estate agents controlling such communities creates a de facto apartheid society and subjects the persons excluded by reason of race or color to a stature of inferiority and second class citizenship. The development of such communities and the policies and practices from which the same are created are contrary to the fundamental precepts of a republican form of government and prevent the realization of freedom and liberty for all citizens, and do therefore directly violate and are prohibited by the 13th Amendment of its own force notwithstanding the absence of ancillary legislation.

ARGUMENT

I

The Refusal to Sell Residential Property Solely Because of Discrimination Against the Race or Color of the Prospective Buyer Is a Deprivation of a Fundamental Civil Right Explicitly Protected by and Is a Policy Prohibited by Section 1978 of the Revised Statutes.

The right of every citizen of the United States to acquire, enjoy, own and dispose of property is a fundamental

civil right intended to be guaranteed and protected by the 14th Amendment. This Court has previously declared that "equality in the enjoyment of property rights was regarded by the framers of that amendment as an essential precondition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee." *Shelley* v. *Kraemer*, 334 U.S. 1, 10, 92 L.Ed. 1161, 1179 (1948). Although it may be argued that the general policy of racial exclusion from the subdivision of Paddock Woods, developed by respondents, is directly prohibited by the 14th Amendment without reliance on substantive legislative implementation, Section 1978 of the Revised Statutes, 42 U.S.C. 1982, provides explicit statutory recognition of a fundamental civil right guaranteed to petitioners by the 14th Amendment, which provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Although a review of the civil rights jurisprudence questions the constitutional source of this congressional enactment, there can be no debate that it finds its historical source in the design and intent of both the 13th and 14th Amendments. Shortly after the 13th Amendment was certified whereby slavery and involuntary servitude were abolished and prohibited, Congress enacted the first civil rights statute, commonly known as Civil Rights Act of 1866, Chapter 31, 14 Stat. 27, which provided:

> "Be it enacted . . . that all persons born in the United States and not subject to any foreign power . . . , hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery and invol-

untary servitude, shall have the same right . . . to inherit, purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white citizens . . ."

Basically it is from this section of the Civil Rights Act of 1866 that Section 1978 of the Revised Statutes was derived. Amici would here intend moreover, that this section of the Federal Statutes should be interpreted and applied not only in the historical context of the civil rights amendments to the Constitution, but likewise in the context of the complicated and integrated social economic society of today. In this context certainly the statute is intended to preserve and protect more than a mere legal capacity or competency to acquire, enjoy, own and dispose of real property, but should permit the enforcement by petitioners of the full and complete enjoyment of and equal treatment as to their property rights, as expressly dictated and required by the language of Section 1978 of the Revised Statutes.

The plain object and purpose of this statute is to entitle petitioners to full and equal treatment in respect to their civil right to acquire and own property in Paddock Woods on a level granted to whites. The exclusionary and discriminatory practice of respondents clearly and obviously is inequal treatment and a deprivation of the fundamental civil right to acquire, enjoy and own property to which petitioners are entitled. This conclusion must result from an interpretation and application of the statute which is realistic and accords the full intent and design of the statute as derived from its historical context and purpose. This case requires more than a purely theoretical approach couched in a discussion of impersonal and abstract truths and principles. The issues here before the Court require full consideration of the fundamental intent and purposes

of the civil rights statutes and Amendments viewed in the context of today's complex social economic society and acknowledging the undeniable impact of efforts to preserve segregated communities and neighborhoods through the deprivation of equal rights to acquire property through exclusionary practices based on racial discrimination.

As clearly and as effectively as was the respondents' policy implemented by local legislation, the general policy followed by respondents in developing their suburban community is offensive to the rights of those desiring, and particularly in the instant case of these petitioners, to acquire, own, occupy and enjoy property in the fulfillment and satisfaction of their fundamental civil right to so do. Such local legislation would obviously violate the 14th Amendment. *Harmon* v. *Tyler*, 273 U.S. 668, 71 L.Ed. 831, 47 S.Ct. 471 (1927); *Buchannan* v. *Warley*, 245 U.S. 60, 62 L.Ed. 149, 38 S.Ct. 16 (1917). Although, assuming arguendo that there is no state action involved in the respondents' discriminatory policies, respondents' exclusionary policy grounded in a discrimination of race or color would not be prohibited by the 14th Amendment, *Shelley* v. *Kraemer*, supra, 13, 1180, petitioners' fundamental civil rights are in no less degree denied them and are explicitly violated by such policy and therefore proscribed as unlawful by Section 1978 of the Revised Statutes. Certainly the ultimate impact and purpose of respondents' action is no less a deprivation of the enjoyment and equality of a civil right than the restrictive covenants and legislation which have as their purpose exclusion of persons from a designated race or color from the ownership or occupancy of real property, which have been struck down by this Court as prohibited by the 14th Amendment. The crucial and decisive issues of the instant case cannot be fully resolved by reference to those cases, however, inasmuch as they did not involve

an attempt to enforce the petitioners' fundamental property rights through the congressional legislation of Section 1978 of the Revised Statutes as now before this Court.

Although the Enforcement Act of 1870 provided in Section 16 thereof for the reenactment of the Act of 1866, and the later enforcement act was adopted pursuant to Section 5 of the 14th Amendment, Section 1978 of the Revised Statutes does not refer in its terms to state action and is not by its terms restricted to the acts of the state or its officers or persons under color of law or pursuant to state action or powers.

To hold that Section 1978 applies against respondents, although individuals and private corporations so as to make unlawful their racial exclusionary policy does not in any way violate the earlier jurisprudence of this Court with respect to the "state action" concept applied to the 14th Amendment. This Court has recently found and held Congress to be empowered to make unlawful the acts of private individuals not acting under color of law when seeking to interfere or deprive persons of their civil rights or immunities pursuant to the enforcement power granted by Section 5 of the 14th Amendment. *United States* v. *Price, et al.*, 383 U.S. 787, 16 L.Ed. 2d 267, 86 S.Ct. 1152, (1966).[14]

To apply Section 1978 against the discriminatory racial policy of respondents cannot be reasonably and con-

14. Justice Fortas discussing the construction of constitutional grants of congressional power stated: "We have no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the due process clause of the 14th Amendment' ". Ibid. 270, 789.

Justice Clark in his separate, concurring opinion in *United States* v. *Guest*, 383 U.S. 745, 16 L.Ed.2d 239, 86 S.Ct. 1170, stated at pages 762, 252, "that there now can be no doubt that the specific language of Section 5 empowers the Congress to enact laws punishing all conspiracies with or without state action—that interfere with the 14th Amendment rights".

stitutionally objectionable merely because they are private individuals or private corporations. *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, 379 U.S. 241, 291, 13 L.Ed. 2d 258, 288, 85 S.Ct. 348 (1964); J. Black concurring, 275, 276. The words of Mr. Chief Justice Marshall uttered in *McCulloch* v. *Maryland*, 4 Wheat. 416, 421, 4 L.Ed. 579, 605, as reiterated by Justice Black at page 279 in the *Heart of Atlanta* case make well the point stressed here by amici:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

The very position of amici taken in the instant case on this issue was recognized by Justice Black, Ibid., 279—that it cannot be denied that "the aim of protecting Negroes from discrimination is also a legitimate end" in the view of the 13th, 14th and 15th Amendments.

Clearly, if Section 1978 is to have any real and effective meaning in today's society and in the milieu of the economic and social conditions of the Nation, the fullest, rational meaning and the broadest application must be given its terms and underlying intent. Just as "the primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity . . .", J. Goldberg concurring, *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra, it is no less true that, regardless of whether Section 1978 was derived from the 13th or 14th Amendment by virtue of the enforcement powers provided therein, the primary purpose of that statute remains "the vindication of human dignity" by explicitly providing for equal availability, access and enjoyment of property rights. Whether discussing public accommodations or housing, discrimination or segregation

on the basis of race or color unequivocally result in the deprivation of personal dignity and fundamental civil rights. The ultimate impact of such racial discrimination and segregation is the same in any instance, as that set forth in Justice Goldberg's concurring opinion, Ibid.,

> " 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that, regardless of education, civility, courtesy, and morality, he will be denied to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.' "

Though Section 1978 may be interpreted as deriving its source solely from Section 5 of the 14th Amendment, under the factual circumstances of the instant case there was a concerted effort by the various respondents herein to deprive petitioners of a basic fundamental right guaranteed and secured to them by the 13th and 14th Amendments. Such action was, furthermore, in direct violation of Section 1978 though it may be finally construed as wholly private action not taken under color of law or without participation or encouragement from the state and not therefore otherwise directly proscribed by the express terms of the 14th Amendment. Without further burdening the Court with repetitious argument, amici would here state to the Court their full and complete support of the exhaustive analysis made in Point II of the argument in the brief presented by the United States as amicus curiae.

II

A General Segregation Policy Enforced by Refusal to Permit Persons to Acquire Property Solely by Reason of Their Race and Color Is Prohibited by the 14th Amendment Though Such a Policy Is Not Implemented or Protected by State Legislation, Committed by State Officers or Persons Acting under Color of Law.

It is readily conceded that "the Civil Rights Cases, 109 U.S. 3, 27 L.Ed. 835, 3 S.Ct. 13 (1883), 'imbedded within our constitutional law' the principle 'that the action inhibited by the first section (equal protection clause) of the 14th Amendment, is only such action as may be fairly said to be that of the State. That amendment erects no shield against merely private conduct, however discriminatory or wrong.'" *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45, 50. Although the prohibitions of the 14th Amendment are addressed to the States, "they have reference to actions of the political body denominated a state, *by whatever instruments or in whatever modes that action may be taken . . .*" *Ex Parte Commonwealth of Virginia and J. D. Coles*, 100 U.S. 339, 346, 25 L.Ed. 676, 679 (1880). Whoever, by virtue of state power, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the 14th Amendment constitutional inhibition; for in whatever respect he possesses state power or the state through substantial involvement encourages or permits such prohibited acts, then the state has clothed one acting pursuant to state action and power to annul or evade constitutional rights and privileges. Ibid., 347, 25 L.Ed. 679.

The 14th Amendment by its terms reaches not only acts done by state officers which are within the strict scope

of the power conferred by the state, officers within the strict scope of the powers possessed, but acts committed or policies followed by private individuals or corporations to whom state power has been delegated and is used to commit acts or engage in conduct which the Amendment forbids, even though the consumption of the wrong may not be within the powers possessed. *Home Telephone and Telegraph Company* v. *City of St. Louis, et al.*, 227 U.S. 278, 57 L.Ed. 510 (1913). The Court in the last cited case, in reviewing constitutional objections to a municipal ordinance fixing telephone rates so unreasonably low that enforcement would bring about confiscation of property of the corporation without due process of law, expressly recognized that the provisions of the 14th Amendment are generic in their terms and addressed to the States as well as to every other person, whether natural or juridical, who is the repository of state power. "By this construction, the reach of the amendment is shown to be coextensive with any exercise . . . of (state) power, in whatever form exerted". Ibid., 227 U.S. 278, 286, 287.[15]

This Court has in more recent times applied the prohibitions of the 14th Amendment to instances wherein private individuals and private corporations are involved notwithstanding objection that such application denies

15. The Court in *Home Telephone and Telegraph Company* v. *St. Louis et al.*, 227 U.S. 278, 288, 57 L.Ed. 510, 515 (1913), described the provisions of the 14th Amendment in the following language:

> "The amendment, looking to the enforcement of the rights which it guarantees to the prevention of the wrongs which it prohibits, proceeds not merely on the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which may conflict with the provisions, but also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result, might be used as an instrument for doing wrongs, provided against all and every such contingency."

said private individuals or corporations of the equal protection of the laws and due process by denying them the freedom of association or selection of those to whom their services are to be rendered. *Burton* v. *Wilmington Parking Authority*, supra; *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, 379 U.S. 241, 13 L.Ed. 2d 258, 85 S.Ct. 384 (1964); *Bell* v. *Maryland*, 378 U.S. 226, 12 L.Ed. 822, 84 S.Ct. 814. Although it may be reasoned that the "civil rights" statute, Section 1978 of the Revised Statutes, is addressed to the states and requires the involvement of some form of state action in order to justify finding of its provisions violated by the conduct of the respondents in the instant case, *Hurd* v. *Hodges*, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187; *Canon* v. *Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, this action need not be direct state legislation. *Burton* v. *Wilmington Parking Authority*, supra; *Evans* v. *Newton*, 382 U.S. 296, 15 L.Ed. 2d 373, 86 S.Ct. 486. Moreover, this court has continually expanded the concept of "state action" enough to bring the respondents in the instant case within the proscriptions of the 14th Amendment.

The simple fact that respondents in the instant case are private individuals or private corporations is not in and of itself a shield against the 14th Amendment prohibition. This Court has consistently refused to permit assertion on the part of private individuals or corporations of the due process of law and equal protection of the law guarantees to thereby raise constitutional immunizations in cases of discriminatory acts or conduct violating the equal protection of the laws provision of the 14th Amendment where such discriminations were based solely upon race or color. *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953); *Burton* v. *Wilmington Parking Authority, Inc.*, supra; *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra. The Constitution con-

fers upon no individual the right to demand action by the state which results in denial of equal protection of the laws to other individuals, *Barrow* v. *Jackson*, supra, 260, 1597, and the Court has applied a broad test of determining state responsibility so as to predicate its consequence upon state action of every kind so as to bring within the prohibitive scope of the 14th Amendment "state participation through any arrangement, management or funds or property". *Burton* v. *Wilmington Parking Authority, Inc.*, supra, 365; *Cooper* v. *Aaron*, 358 U.S. 1, 4, 3 L.Ed. 2d 1, 9, 78 S.Ct. 1397, 1401 (1958).[16]

As for the formula or test to be applied in determining whether certain conduct or acts abridge the equal protection clause, the Court in *Burton*, supra, at pages 365, 50, indicated the broad application of the state action concept in the following language:

> "Because of the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships, which the amendment was designed to embrace. For this same reason, to fashion and apply a precise formula for recognition of state responsibility under the equal protection clause is an 'impossible task' which 'this Court has never attempted . . .' Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."

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16. This principle of state involvement was couched by this Court in *Burton* v. *Wilmington Parking Authority, Inc.*, supra, 365, 50, in the following language: "It is clear, as it has always been in Civil Rights Cases (U.S.), supra, that 'individual invasion of individual rights is not subject matter of the amendment', at page 11, and that private conduct of bridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it."

As discussed by the amici in their statement of interest, they would reiterate at this point that the business enterprise of respondents carried on in the subdivision and development of lands within St. Louis County, a suburban "community", is in the milieu of the facts and circumstances of such enterprise to be so substantially affecting the public interest as to be impregnated with public interest and governmental character as to come within the broad scope of the 14th Amendment prohibitions. The platting, development, use and occupancy of residential subdivisions is directly and substantially related to the exercise of state's and local government's police powers, including St. Louis County in the instant case, for the courts have recognized that the very authority of state and local governments to limit, restrict and regulate the subdivision and development of lands within its corporate boundaries are founded on their effect upon the public interest. The general object and design of zoning laws and subdivision regulations is to promote, preserve and protect the public health, safety, morals and welfare of the inhabitants of the state, county or municipal corporation adopting the same. *Brown* v. *Beuc*, 384 S.W.2d 845 (Mo.); *St. Louis County* v. *City of Manchester*, Mo., 360 S.W.2d 638; *Hoffman* v. *Kinealy*, Mo., 389 S.W.2d 745; *State ex rel. Cooper* v. *Cowan*, Mo., 307 S.W.2d 676; and *State* v. *Christopher*, 317 Mo. 779, 298 S.W. 720. The suburban community of Paddock Woods being developed by respondents was from its very inception planned, designed and developed only by virtue of the regulations, restrictions and limitations embodied in the subdivisions of St. Louis County, Chapter 1005 (petitioners' appendix, pages 69, et seq.), which were enacted pursuant to and by virtue of Section 64.060 of the Missouri Statutes. Only by virtue of these provisions of the law could respondents, although

private individuals and corporations and owning land outside of some public redevelopment project, and although without federal or state financing, develop the subdivision of Paddock Woods. In addition thereto, the respondents' subdivision developer, Alfred H. Mayer Company, exclusive real estate dealer and sales agent, Alfred Realty Company, and the Paddock Country Club, Inc. are permitted to engage in this business enterprise only by virtue of and in compliance with the corporation and business laws of the State of Missouri. Thus, although respondents are private individuals and corporations, as distinguished from a public or governmental agency or corporation, the business enterprise of the subdivision and development of residential land and property and homes is an enterprise which has become today substantially related to the public interest.

Amici here contend that there is such state involvement in and cooperation with the development of respondents' residential suburban community that the consequences of such state action must devolve upon respondents' activities so as to bring them within the prescription of the 14th Amendment as it was found in *Burton* v. *Wilmington Parking Authority, Inc.*, supra, which case amici contend gives perspective to the issues of the instant case notwithstanding the factual distinction, none of which amici would argue defeat a finding of state action or involvement in the instant case, wherein the Court concluded at page 376, that:

> "The state has so far insinuated itself into a position of interdependence with evil that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the 14th Amendment."

Justice Douglas, in discussing the distinction to be made between private and state action in determining the balance between the right to discriminate and freedom of association and equal protection of the laws, had this to say in *Evans* v. *Newton*, supra, at page 299:

> "What is 'private action' and what is 'state action' is not always easy to determine. . . . The conduct that is formerly private may become so intertwined with government policies and so impregnated with governmental character as to become subject to constitutional limitations based on state action. . . . A town may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector. . . . A state is not justified, we said, in 'permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . .' (*Marsh* v. *Alabama*, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276), at 509, 90 L.Ed. 270 . . . That is to say that when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations."

The situation and the issues presented to the Court in the instant case are entirely analogous with those before the Court in *Marsh* v. *State of Alabama*, 326 U.S. 501, 90 L.Ed. 265 (1946), and amici would contend that the fundamental issues involved in both the instant case and that then before the Court are quite similar and that the result reached therein gives to petitioners substantial support in the contention that the exclusionary policy based solely on race or color followed by respondents in refusing to sell residential property in the suburban community which they had developed is proscribed by the 14th Amendment. Just as in *Marsh*, so it is true here that should such a policy be prescribed by state or local law or custom, it would clearly violate the Constitution. The mere fact that

Paddock Woods, a suburban community, is owned by respondent corporations and controlled and managed by them and eventually by a homes association cannot justify unrestricted discrimination against petitioners by refusing to permit them to reside in such community and thereby depriving them of their fundamental civil right to purchase, own and enjoy property on equal terms and according to equal treatment with Caucasians. See also *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953), wherein it was clearly determined that the refusal to sell to non-Caucasians or to require them to pay a higher price for property solely because of their race violated the equal protection of the law provisions of the 14th Amendment by depriving them of the ability to purchase, own and enjoy property on equal terms with whites.[17]

The mere argument that development of a private residential subdivision is a purely local matter or business of a purely local character or that the real issues involved here deal with moral and social equality rather than equality of civil rights raise no substantial objection under the entire circumstances and facts in the instant case so as to in and of itself deprive the petitioners of the equal protection and enforcement of their fundamental civil rights herein sought. *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra; See also Ibid., J. Black concurring, 275, 276; J. Clark for

17. The Court further held in *Marsh* v. *State of Alabama*, 326 U.S. 501, 90 L.Ed. 265 (1946), that:

> "We do not think it makes any significant constitutional difference as to the relationship of the rights of the owner and those of the public that here the state . . . permitted (the corporation) to use its property as a town. . . . Whether a corporation or a municipality owns or possesses the town, the public in either case, has an identical interest in the function of the community. . . . As we have heretofore stated, the town of Chickasaw does not function differently than any other town. . . . The manager appointed by the corporation could not curtail the liberty of press and religion of these people consistently with the purposes of the constitutional guarantees."

the majority, 269. Constitutional objections to the theories relied on herein in support of petitioners must necessarily be confronted with the idea so aptly expressed by Justice Black, Ibid., 280, that:

> ". . . It would be highly ironic to use the guarantee of due process—the guarantee which plays so important a part in the 14th Amendment, an amendment adopted with the predominant aim of protecting Negroes from discrimination—in order to strip Congress of the power to protect Negroes from discrimination."

It would seem to be logically arguable that the development of residential suburban communities in large metropolitan areas has no less a direct and substantial relation to the public interest and public functions as the private enterprises named in the public accommodations sections of the Civil Rights Act of 1964. Residential suburban development does in fact have a direct and substantial effect on the public welfare so as to bring such an enterprise significantly within the public domain and so intermingle it in the public interest and the exercise of the police power of the state and local governments that they now fall within the prescriptions of the 14th Amendment.[18] *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra. As noted by this Court in *United States* v. *Guest, et al.*, 383 U.S. 745, 16 L.Ed. 2d 239, 86 S.Ct. 1170, "the involvement need not be either exclusive or direct for in a variety of situations this Court has found state

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18. Thus the issue in the instant case is much the same as that with which the Court was presented in *Evans* v. *Newton*, supra, 298, 377, wherein the Court stated the issues thusly:

> "There are two complimentary principles to reconcile . . . one is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such groups and clubs as he chooses. The other is the constitutional ban in the equal protection clause of the 14th Amendment against state-sponsored racial inequality. . . ."

action even though the participation of the state was peripheral or its action was only one of several cooperative forces leading to the constitutional violation."

To permit without constitutional limitations the exclusion of Negroes solely because of their race from the suburban community developments such as Paddock Woods, has as its immediate objective and ultimate impact, viewed in an historical context, a denial of equality and deprivation of fundamental civil rights not unlike that resulting from the so-called "Proposition 14" found prohibited by the "equal protection of the laws" clause of the 14th Amendment of the Constitution of the United States by this Court in *Reitman* v. *Mulkey*, ... U.S. ....., 18 L.Ed. 2d 830, 87 S.Ct. ..... (1967).[19] This Court affirmed the California Supreme Court's interpretation of the immediate design and intent of Proposition 14 "to overturn state laws that bore on the right of private sellers and lessors to discriminate", and establishes "a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the 14th Amendment should state action be involved." Ibid., 18 L.Ed. 2d 834.

The State of Missouri could not directly establish in private individuals or corporations an express right to discriminate on the basis of race or expressly approve a general policy of excluding and denying a right to Negroes to purchase and acquire property in any residential sub-

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19. Proposition 14 was an initiated amendment, Sec. 26 of Article I, to the California state constitution, and its general language applied to real property devoted to residential purposes. Its text provided in its first paragraph:

> "Neither the State nor any subdivision or agency thereof shall deny, limit, abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses."

division. Therefore, the question becomes can the State by remaining silent or following a "neutral position" permit the respondents to follow such a policy and thereby through exercising broad powers and privileges under state statutes and county subdivision regulations to do indirectly what the State would be prohibited by the 14th Amendment to do directly. The State of Missouri has by failing to guarantee the "equal protection of the laws" to petitioners made it legally possible for respondents to engage in racial discrimination which denies to petitioners equality and full enjoyment of their property rights. This inaction or omission on the part of the state has, it would seem in historical context "encouraged" discrimination by making it legally possible for respondents to follow a general discriminatory policy, and which has by its immediate objective and impact "authorized private discrimination" and made the state "at least a partner in the instant act of discrimination. . . ." Ibid., 835.

The State is in effect by inaction or omission in following a "neutral" position permitting and encouraging the racial discrimination committed by respondents in the exercise of powers and privileges granted by state statutes and county subdivision regulations. Historically, it has been held that zoning laws and subdivision regulations are affected with public interest of substantial nature and are directly related to the health, safety, morals, and welfare of the community, generally and its inhabitants. Although respondents are engaged in what is private enterprise, their business operations and activities in platting, subdividing and developing lands as "suburban communities" are ones affected with a high degree of public interest, and they have in the pursuit of private financial gain and profit secured the advantages and privileges of the statutes of the state and the provisions of county law. Historical conditions and the social and economic inequal-

ities resulting from discriminatory practices in the residential housing markets and the development of suburban communities dictate and demand, as never before, in the interest of equal civil rights for all citizens and the peace and order of the society, that state "inaction" as well as state action permitting discrimination against the right to acquire residential property and the development of white segregated communities be prohibited by the 14th Amendment to the Constitution of the United States. See J. Goldberg's discussion of state inaction, concurring opinion, *Bell* v. *Maryland*, supra, 378 U.S. 309-312. The contention here made by amici is not unlike the theory followed by this Court in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45, 81 S.Ct. 856, as reiterated in *Reitman* v. *Mulkey*, supra, 837.[20]

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20. This Court in deciding *Reitman* v. *Mulkey* reiterated the conclusion reached in *Burton* v. *Wilmington Parking Authority* giving emphasis to the state's policy of inaction in the following language:

> "In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45, 81 S.Ct. 856, the operator-lessee of a restaurant located in a building in this state and otherwise operated for public purposes, refused service to Negroes. *Although the state neither commanded nor authorized or encouraged the discriminations, the state had 'elected to place its power, property and prestige behind the admitted discrimination' and by 'its action . . . has . . . made itself a party to the refusal of service . . .' which therefore could not be considered purely private choice of the restaurant operator.*" (Emphasis supplied).

Justice Douglas noted in his concurring opinion in *Reitman* v. *Mulkey*, supra, 18 L.Ed. 2d 830, 838-839, the complex and concerted effort to maintain segregated communities followed by real estate brokers and mortgage lenders: "Real estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities. Realtors commonly believe it is unethical to sell or rent to a Negro in a predominantly or all white neighborhood, and mortgage lenders throw their weight alongside segregated communities, rejecting application by a member of a minority group who tries to break the white phalanx save and unless the neighborhood is in the process of conversion into a mixed or Negro community. We are all told by the Commission on Civil Rights:

Upon the foregoing authorities and the resolution of the instant issues as hereinabove reasoned, amici would

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"Property owners' prejudices are reflected, magnified and sometimes even induced by real estate brokers through whom most housing changes hands. Organized brokers have, with few exceptions, followed the principle that only a 'homogeneous' neighborhood insures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. The financial community, upon which mortgage financing—and hence the bulk of home purchasing and home building—depends, also acts to the large extent on the premise that only a homogeneous neighborhood can offer an economically sound investment. For this reason, plus the fear of offending their other clients, many mortgage-lending institutions refuse to provide home financing for houses in a 'mixed' neighborhood. The persistent stereotypes of certain minority groups as poor credit risks also block the flow of credit, although these stereotypes have often been unjustified." Housing, U.S. Commission on Civil Rights (1962), pages 2-3.

"The builders join in the same scheme: '. . . private builders often adopt what they believe are the views of whom they expect to sell and of the banks on whose credit their own operations depend. In short, as the commission on race and housing has concluded, 'It is the real estate brokers, owners and mortgage institutions, which translate prejudice into discriminatory action.' Thus, at every level of the private housing market members of minority groups meet mutually reinforcing and often unbreakable barriers of rejection."

As for the joint participation in the operation and impact of the zoning laws, Justice Douglas in his concurring opinion, supra, had this to say:

". . . (The) right to own or lease property is already denied to many solely because of the pigment of their skin; they are, indeed, under the control of a few who determine where and how the colored people shall live and what the nature of our cities will be. Second, the agencies that are zoning the cities along racial lines are state-licensees.

"Zoning is a state and municipal function . . . when the state leaves that function to private agencies for institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts and white or black ghettos, it suffers a governmental function to be performed under private auspices in a way the state itself may not act. . . .

". . . These licensees are designated to serve the public. Their licenses are not restricted, and could not be restricted, to effectuate a policy of segregation. That would be state action which is barred by the 14th Amendment. There is no

conclude thusly. If it be determined and held by this Court that Section 1978 of the Revised Statutes is intended to apply against and be directed only to the States and local governments or officers acting under state power or individuals or corporations with which the state is involved, then the general policy of refusing to sell to Negroes residential property within Paddock Woods by the respondent is so intertwined and intermingled with the exercise of the state police powers and affected with the public interest that the provisions of Section 1978 have been violated by the respondents. However, amici here emphasize their original position that, just as Justice Brennan, concurring, *United States* v. *Guest*, supra, 775, 779, found the provisions of Section 241, 18 U.S.C. (1964 Ed.) to be violated by a private conspiracy to interfere with a right secured by the Constitution, the racially discriminatory policies of respondents deprive the petitioners of the fundamental civil right guaranteed them by the 13th and 14th Amendments as expressly and explicitly declared by Section 1978.[21] Lastly, amici earnestly con-

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difference, as I see it, between a state authorizing a licensee to practice racial discrimination and a state, without any express authorization of that kind nevertheless launching and countenancing the licensing of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the state is impliedly sanctioning what it may not do specifically.

"If we were in a domain exclusively private, we would have different problems. But urban housing is in the public domain as evidenced not only by the zoning problems presented but by the vast schemes of public financing in which the states and the nation have been extensively involved in recent years. Urban housing is clearly marked with the public interest. . . ."

21. Justice Brennan, *United States* v. *Guest*, supra, 780, applied the same theory and reasoning to Section 241, 18 U.S.C., prohibiting conspiracies to deprive citizens of their constitutional civil rights; amici would refer the Court further to Justice Brennan's discussion of the congressional power contained in Section 5 of the 14th Amendment at page 782, *United States* v. *Guest*, supra.

clude that though the 14th Amendment does not restrict invasion of individual rights by purely private discriminations, the private businessman's invocation of the state police power to carry out his own policy of racial discrimination is contrary to the 14th Amendment guarantees secured to those against whom the racial discrimination is directed. *United States* v. *Guest*, supra, 756; *Bell* v. *Maryland*, 378 U.S. 26, 12 L.Ed. 2d 822, 84 S.Ct. 1814. The business enterprise of subdividing and developing the community of Paddock Woods must be recognized to be directly and substantially related to the state and local public interest. It is of such public consequence and so affects the community as a whole to become an enterprise within the public domain. Therefore, it is the contention of amici that by reason of these integrated principles and these particular facts, the racial exclusionary policy which barred petitioners from the acquisiton, ownership and enjoyment of property within Paddock Woods solely because of race or color denies to the petitioners the fundamental civil rights guaranteed them by the 14th Amendment, as well as Section 1978 of the Revised Statutes. The general policy of respondents complained of in this cause which is on its face blatant racial discrimination and creates a wholly segregated and closed residential community is by reason of the foregoing within the prohibitive scope of the 14th Amendment itself and must thereby be declared unlawful and unconstitutional racial discrimination.

III

The Thirteenth Amendment Is Self-Executing and Directly Prohibits the Racial Segregation Policy Followed by Respondents in Developing Suburban Residential Communities.

In addition to the contentions heretofore presented that the right to purchase, enjoy and dispose of property

has been recognized by the Constitution as and guaranteed as a basic fundamental civil right; is explicitly recognized by provisions of Section 1978 of the Revised Statutes; and entitled to the full protection guaranteed by the 14th Amendment, amici would contend and do hereby propose to the Court that the policy of discrimination by reason of race and color followed by respondents is prohibited directly by the 13th Amendment to the Constitution, notwithstanding Section 1978 of the Revised Statutes may be held to have been enacted and derived from the Enforcement Act of 1870 pursuant to Section 5 of the 14th Amendment. It is hereby contended that implementing congressional legislation is not necessary to permit this Court to grant petitioners the full protection intended by the provisions of and in accordance with the enactment of the 13th Amendment abolishing and prohibiting slavery and involuntary servitude. *Civil Rights Cases*, supra, l.c. 20. The 13th Amendment "abolished slavery and established universal freedom" and is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States". *Civil Rights Cases*, supra, 20. Although Congress is empowered by Section 2 thereof to enforce the same, "this amendment . . . is undoubtedly self-executing without any ancillary legislation . . ." Ibid.

To permit respondents to establish a suburban community within which Negroes are deprived of the right to acquire, own and enjoy property solely because of their race or color is to permit the perpetuation of the vestiges of the institution of slavery by the deprivation of this fundamental civil right; the resulting establishment of a de facto apartheid community is but a "badge of slavery or servitude". *Plessy* v. *Ferguson*, 163 U.S. 537, 555. The attempt by respondents to exclude persons because of their race is but an attempt to deprive petitioners to exercise and pursue the full enjoyment of their fundamental prop-

erty rights and the opportunity to exercise the privileges afforded by reason of the freedom, liberty and equality guaranteed them as citizens by the Constitution. *Shelley* v. *Kraemer*, supra; *Evans* v. *Newton*, 382 U.S. 296; *Buchanan* v. *Warley*, supra.

There is no need for speculation as to what the concept of "bondage", to be subjected to involuntary servitude, meant in its historical context prior to the passage of the 13th Amendment. The Negro race was regarded as an inferior race, "altogether unfit to associate with the white race, either in social or political relations." *Civil Rights Cases*, supra, J. Harlan, dissenting, 31:

> "It was regarded as an axiom in morals as well as in politics which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion." Ibid.

Since the passage of the Civil Rights Amendments, this Court has consistently held that the 13th, 14th and 15th Amendments to the Constitution expressly guaranteed to all citizens freedom, liberty and equality regardless of "race, color or previous condition of servitude." *Bell* v. *Maryland*, supra, 286, 833. It has been this standard which the Court has faithfully followed in giving the "equal protection" clause meaning as the "revelation of an enduring constitutional purpose" whereby racial segregation by law is declared to create unconstitutional inequality.

Segregation of suburban communities created by the racially exclusionary policy followed by respondents purely and simply perpetuates a caste system in the United States and is the antithesis of the design guarantees, and of the 13th, 14th and 15th Amendments to the Constitution.

The respondents' policy of refusing to sell its property to petitioners solely by reason of their race or color subjects them to second-class citizenship and establishes a de facto apartheid society which is, in the language of this Court, a separation of races by its " 'very nature odious to a free people whose institutions are founded upon the doctrine of equality' ". *Bell* v. *Maryland,* supra, 834, 288.

As the term "commerce" as used in the Constitution is today interpreted "to comprehend every species of commercial intercourse", *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra, it may likewise be argued that the term "involuntary servitude", in the context of the times and today's highly complex society, should be realistically interpreted to comprehend every species of servitude, enforced or effected directly or indirectly; including the segregation or discrimination of persons by reason of color or race whereby they are subjected and enclosed within de facto racial ghettos because of policies effectively excluding them from the exercise of their fundamental civil right to purchase property in suburban residential communities, such as Paddock Woods in St. Louis County. The 13th Amendment was enacted for the purpose of uprooting the institution of slavery wherever it existed in the land and to establish universal civil freedom and liberty. It was intended, however, to do something more than merely prohibit slavery as an institution; it was intended as well to eradicate the badges and incidents of slavery to eliminate the burdens and disabilities which by their impact constitute badges of slavery and servitude and thereby "secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, . . ." *Civil Rights Cases,* supra, J. Harlan dissenting, at page 35. To permit respondents to follow a policy of racial discrimination in the development of residential suburban com-

munities is to perpetuate a society inflicted with "involuntary servitude" and "bondage" of a second class citizen, to make or allow such discrimination against the Negro race, in the enjoyment of those fundamental rights, which is a universal concession inherent in a state of freedom, is a gross contradiction of the intent and design of the 13th Amendment. Ibid., 34.[22]

The policy followed by respondents from which petitioners seek the protection of this Court is clearly contrary to the "pervading purpose" of the 13th Amendment. As stated by J. Harlan, *Civil Rights Cases*, supra, 44:

> "Remembering that this court, in the Slaughter-House Cases declared that the one pervading purpose found in all the recent amendments, lying at the foundation of each, and without which none of them would have been suggested, was 'The freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppression of those who had formerly exercised unlimited dominion over him'—that each Amendment was addressed primarily to the grievance of that race. . . ."

The right to purchase, own, enjoy and dispose of real property without discriminations based solely upon race or color is a fundamental right and privilege, fundamental in citizenship in a free republican government and common to all citizens of these United States on equal terms and

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22. Justice Harlan went on to conclude, *Civil Rights Cases*, supra, 36, that:

> ". . . I hold that since slavery, as the court has repeatedly declared, *Slaughter-House Cases*, 16 Wall. 36 [73 U.S. XVIII, 394]; *Strauder* v. *W. Va.*, 100 U.S. 303 [XXV, 664], was the moving or principal cause of the adoption of that [13th] Amendment, and since that institution rested wholly upon the inferiority as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belonged to free men of other races."

with equal treatment to each and every citizen without regard to race and color, for "the quality of the rights of citizens is a principle of republicanism". *U.S.* v. *Cruikshank*, 92 U.S. 542, 555 [XIII, 588]. Moreover, the "emphatic language of this Court is that 'one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the states.' "

As long as citizens of these United States can be denied equal treatment by exclusion solely by reason of their race or color from the purchase, ownership and enjoyment of property within suburban residential communities of the nature of Paddock Woods, these great constitutional purposes, fundamental to the very existence of a republican nation dedicated to the freedom and liberty and equality of all citizens in the exercise of their civil rights, will be mere idle words uttered by those dedicated to preserving this nation and hollow dreams of a Constitution intended to endure for generation to generation to preserve for all citizens freedom, liberty and equality.[23]

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23. In discussing the existence of a right without the opportunity and privilege to effectively exercise the same, J. Harlan, *Civil Rights Cases*, supra, 39, 40, discussed the same in the following language, which is analogous to the point made in this portion of the argument:

> " 'Personal liberty consists', says Blackstone, 'in the power of locomotion, of changing situation or removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law.' But of what value is this right of locomotion, if it may be clogged by such burdens as Congress intended by the Act of 1875 to remove? They are burdens which lie at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is, in this land of universal liberty, a class which may still be discriminated against, even in respect of rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a free man is not only branded as one

Respondents' policy of exclusion which deprived petitioners the right to purchase, own and enjoy property within the suburban community which they developed violates both the letter and the spirit of the 13th Amendment, for it is a deprivation of the petitioners' fundamental civil rights and clearly by its effect and impact subjects them to a "species of servitude within the meaning of the Amendment", for the said amendment by its "reflex character" established and decreed universal civil and political freedom throughout the United States.[24]

Of the 13th Amendment the Court has said in *Clyatt* v. *United States*, 197 U.S. 207, 216, that:

"This amendment denounces a status or condition, irrespective of the manner or authority by which it is

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inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence; and all this solely because they belong to a particular race which the nation has liberated. 'The 13th Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned."

24. The impact and effect of discrimination solely by reason of race or color by depriving persons of the right to purchase, own and enjoy property within a residential suburban community as a whole, is not unlike that to which the Court addressed itself in *Brown et al.* v. *Board of Education of Topeka et al.*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R. 1180 (1954), wherein the Court stated at 347 U.S. 493, 494, that:

"Compulsory school attendance laws of the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, and preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. . . .

* * *

". . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

created. The prohibitions of the 14th and 15th Amendments are largely upon the acts of the state; but the 13th Amendment names no party or authority, but simply forbids slavery and involuntary servitude . . .

"The 13th Amendment does not permit the withholding or the deprivation of any right necessary inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude . . ." *Plessy* v. *Ferguson,* 163 U.S. 537, 555, 41 L.Ed. 256, 262 (1896).

Justice Harlan went on, in the last cited case, in his dissenting opinion to state that "in the view of the Constitution, in the eye of the law, there is no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, neither knows nor tolerates classes among citizens. In this end respect of civil rights, all citizens are equal before the law." Just as Justice Harlan saw it in the *Plessy* case, so in the instant case it would be regrettable if it should be concluded that it is competent for respondents to regulate and deny the enjoyment by petitioners of their civil rights solely upon the basis of race.

The "seeds of race hate" have been implanted throughout the Nation by a universal policy, notwithstanding the same be private as distinguished from public, of excluding and prohibiting Negroes from equal enjoyment of what might be appropriately termed the "New Society", the "suburban way of life", if you will, that has become the 20th Century way of life for the white race. "The destinies of the two races in this country are indissolubly linked together." What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust among the races than a universal policy of segregation in housing that proceeds on the ground that the colored

citizens are so inferior and degraded that they cannot be allowed to become integrated members of white communities, integrated members of the white suburban society. This policy of discrimination and segregation in housing notwithstanding the same may be the result of corporate and private policies "can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned." *Plessy* v. *Ferguson*, supra, 561, 264.

This whole issue involved in the instant case is not satisfactorily met "by the suggestion that social equality cannot exist between the white and black races in this country." Regardless of the elimination of race discrimination, and the final integration of races, there will undoubtedly remain discriminations founded upon economic class distinctions, the same as recognized by Justice Harlan in his dissent.[25] The arbitrary separation of citizens on the basis of race from white neighborhoods, white suburbs, the new white society "is a badge of servitude wholly inconsistent with the civil freedom . . . established by the Constitution. It cannot be justified upon any legal grounds."

It may well be true that slavery has disappeared from this Nation and that according to theory and the express law of the Land the race line has been obliterated from our systems of government and our free institutions have

25. "That argument, if it can properly be regarded as one, is scarcely worthy of consideration, for social equality no more exists between the two races when traveling in a passenger coach or public highway, than when members of the same race sit by each other in a streetcar or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of the city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting." *Plessy* v. *Ferguson*, supra, 561, 264; or, amici would continue, when they live within the same communities, neighborhoods or even side by side on the same block.

been placed upon the broad and sure foundation of the equality of all men before the law. Nevertheless, the erection and the creation of a de facto apartheid society by reason of a policy of discrimination and segregation in private subdivision housing by adherence and enforcement of real estate policies affecting large neighborhoods and even whole communities and incorporated municipalities of the metropolitan areas of this Nation, are wholly inconsistent with the civil freedom and personal liberty of its citizens. Such policies and their ultimate impact "interfere with the full enjoyment of the blessings of freedom . . . regulate civil rights, common to all citizens, upon the basis of race . . . [and perpetuate] a condition of legal [and economic and social] inferiority of a large body of American citizens, now constituting a part of the political community, called the people of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the constitution to each state of a republication form of government . . ." *Plessy* v. *Ferguson*, supra, 563, 564; 265. (Bracketed language added by author.)

CONCLUSION

Those, who would by discriminatory conduct and acts, which for American citizens in a free republic are but committed in sheer bigotry, and create for the Negroes in their urban ghettos de facto apartheid communities, are subjecting the Negroes to a status of inferiority and second-class citizenship cut off from the rest of society by curtains of discrimination. They are by such racially discriminatory policies affecting and perpetuating the badges and incidents of slavery and involuntary servitude. The "invidious scheme" to evade the results and implications of

the historical context within which the 13th, 14th and 15th Amendments were adopted and the jurisprudence that has followed, and to further perpetuate a segregated white society by the establishment of de facto apartheid communities cannot be permitted to stand under the test of freedom, liberty and equality universally established by these Amendments and as required in effecting their intent and design. The existence of such a scheme seems to stand in irreconcilable juxtaposition to all which was intended by these Amendments.

The hopelessness, frustration, hostility, outrage and deprivation created by social and economic deprivation and isolation are but the offspring of discrimination and segregation in residential housing—effected primarily by the establishment of racial exclusionary policies which permit the maintenance of residential suburban communities in which persons, such as petitioners herein, are denied the right to exercise their fundamental civil right of property ownership and enjoyment. Such segregation and discrimination must certainly be prohibited and eliminated by the 13th and 14th Amendments, for they are "clearly the roots of the whole syndrome of racism involved in the civil rights struggle."[26]

Amici do hereby petition this Court to permit the impoverished, the outcast, the deprived and hopeless to escape their ghettos to a stature of full and equal citizenship, immune from bigotry and racial discrimination; to

26. Address by Robert L. Carter, General Counsel, NAACP, Housing Conference, New York, June 29, 1965, as reported in "Affirmative Action to Achieve Integration", p. 28 (National Committee Against Discrimination in Housing, New York, N. Y.: 1966).

give those citizens deprived of a fundamental civil right the hope, freedom, liberty and equality intended by our forefathers who, acting through faith in the fundamentals of a democratic republic and in dedication to a belief in human dignity, adopted the 13th, 14th and 15th Amendments. The preservation of this republic from self-destruction, violence and disorder, and conceivably interracial civil war fermented in fear and hatred may well lie in the balance of justice with the decision of this Court on the issues here presented. The petitioners, and many other citizens similarly situated, see in this case hope for a society eroded by violence, disorder and racial discrimination; hope that the curtain of de facto enslavement may be shredded and the clouds of race hatred and fear dispersed, should the contentions made by petitioners and the supporting amici curiae be found persuasive and justified by the principles of a republican government, by the fundamental concepts of freedom, liberty and equality, and by law, reason and the universal sense of justice.

In these times of widespread civil disorder and criminal violence, much of which finds its birth in racial hatred, fear, resentment and degradation, times in which American lives have been lost at the hands of others acting in confusion and from frustration and hopelessness, and times in which valuable property has been wantonly destroyed, the words of warning spoken many years past seem particularly and ironically appropriate:

> ". . . The time will come when retaliation will be resorted to unless the government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various com-

munities and sections. It is not only necessary for the freed man, but it is important to the white people . . . that by plain and stringent laws, the United States should interpose and preserve peace and quiet in the community."[27]

Although we are merely two local governments which are a part of only one large metropolitan area of this Nation, amici are charged with the highest of public obligations and responsibilities—the duty to protect the health, morals, safety, prosperity and welfare of the community within which hundreds of thousands dwell and work all in the pursuit of life, liberty and happiness. These most treasured goals, natural to every man regardless of race and color or previous servitude, have remained frustrated by bigotry and the tyranny of the rich over the poor, the strong over the weak, of one race against another, by discriminations and segregation which have cut off citizens from and deprived them of their fundamental civil rights and the freedom and liberty to which they are entitled both as natural men and citizens of these United States. We now come before this Court, which is charged with preserving the "supreme law of the land" and the freedom, liberty and equality of all men, in support of the petitioners herein; we come in the defense of a cause—"the cause of . . . law against violence; mercy and tolerance against brutality and iron bound tyranny."

27. *United States* v. *Price et al.*, 383 U.S. 787, 809, 16 L.Ed. 2d 267, 281, 86 S.Ct. 1152; Remarks of Senator Poole of North Carolina on sponsoring Sections 5-7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611-3613).

For the reasons and pursuant to the authorities stated above, amici curiae pray the judgments below be reversed and the cause remanded for trial.

Respectfully submitted,

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FAIR HOUSING ACT

Kansas City, Missouri

Section 39.271. **Declaration of Policy.**—It is hereby declared to be the public policy of the City of Kansas City to bring about, through fair and lawful adjustment procedures and infliction of lawful punishment upon recalcitrant violators, the opportunity for each natural person to enjoy, as far as his individual capacity and ability permits, good, wholesome, and decent housing accommodations, without regard for his race, religion, national origin or ancestry.

It is further declared that this policy is grounded upon a recognition of the inalienable right of each natural person to provide for himself and his family, a place of abode according to his own choosing and as sufficient as his individual talents, industry, and circumstances permit and respecting the identical right of other natural persons; and, further, that the denial of such right through considerations solely based upon race, religion, national origin or ancestry is detrimental to the health, safety and welfare of the inhabitants of the City of Kansas City and constitutes an unjust denial or deprivation of such inalienable right which is properly within the power of government to prevent.

This act is applicable to any and all individuals, firms, partnerships, corporations and other entities, associations and organizations of every kind whatsoever directly or indirectly committing or attempting to commit discrimination, based on race, religion, national origin or ancestry in order to deny, inhibit, or otherwise interfere with the law-

ful acquisition, enjoyment or use of a housing accommodation within the territorial limits of the City of Kansas City.

Section 39.272. **Definition of Terms.**—As used in this article, unless a different meaning clearly appears from the context in which used, the following terms shall be taken to have the meaning ascribed in this section; provided, however, that no term shall be given a meaning which will be destructive to the policy of the City of Kansas City, to-wit:

(1) "Chairman" refers to the Chairman of the Fair Housing Committee;

(2) "Discrimination" refers to a distinction based upon race, religion, national origin or ancestry, under circumstances where such distinction is arbitrary, capricious or unreasonable.

(3) "Housing Accommodation" refers to any building, or structure, or portion thereof, or any unimproved land, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as a home, residence, sleeping place or place of abode by one or more natural persons; excluding however, rooms in a single-family residence occupied by the owner thereof;

(4) "Person" in either the singular or plural form includes any firm, partnership, corporation, trust, association or other organization or entity of whatever character, as well as a natural person.

Section 39.273. **Prohibited Acts.**—It shall be unlawful for:

(1) Any real estate broker, salesman, agent or employee thereof, to attempt or commit a discrimination with respect to the prospective transfer or transfer of any in-

terest whatsoever in a housing accommodation, or to deliberately and knowingly refuse examination of any listing of residential real estate to any person because of race, religion, national origin or ancestry.

(2) Any person, including, without limiting the generality of the foregoing, any real estate broker, salesman, agent or employee thereof, directly or indirectly to solicit the sale, lease or the listing for sale or lease, of residential property on the ground of imminent, prospective or eventual loss in the value of such property due to the present, imminent or prospective entry into the neighborhood of a person or persons of a particular race, religion or ethnic origin, or use such fact or suspicion as a sales or listing inducement or stimulant, nor shall he distribute or cause to be distributed material or make statements designed to induce a residential property owner to sell or lease his property due to such fact, suspicion or imminent change in neighborhood.

(3) Any person, including, without limiting the generality of the foregoing, any bank, money lending, credit securing or other financial institution, or any director, officer, agent or other employee thereof, to attempt or commit a discrimination in the conduct of its business when concerned directly or indirectly with the prospective transfer or transfer of any interest in a housing accommodation.

Section 39.274. **Punishment of Violators.**—Any person who shall violate any one or more of the provisions in Section 39.273 of this article shall, upon conviction therefor, be punished for each such violation by a fine not exceeding Five Hundred Dollars ($500.00), or by imprisonment at the Municipal Farm for a period of time not to exceed one (1) year for each such violation, or by both such fine and imprisonment.

FAIR HOUSING ACT

Kansas City, Kansas

Section 1. It is hereby declared to be the policy of the City of Kansas City, Kansas, to bring about good, wholesome and decent housing accommodations through fair and lawful adjustment procedures and penalties for violators who deny any person the opportunity to enjoy said housing accommodations on account of race, religion, national origin or ancestry.

Section 2. It shall be unlawful for any person, real estate broker, salesman, agent or employee thereof, or any bank, money lending, credit securing or other financial institution, or any director, officer, agent or employee thereof, or any owner of any interest in a housing accommodation to discriminate with respect to renting, leasing or the transfer of any interest whatsoever in any housing accommodation or to aid, abet, incite, compel, coerce or conspire with other persons to discriminate in any housing accommodation on account of race, religion, national origin or ancestry; provided, however, that this section shall not apply to persons renting rooms in their own homes.

CODE OF GENERAL ORDINANCES OF KANSAS CITY, MISSOURI ON SUBDIVISIONS

Sec. 31.4. Sale of lots from unrecorded plat.

It shall be unlawful to sell, trade or otherwise convey or offer to sell, trade or otherwise convey any lot or parcel of land as a part of, or in conformity with any plan, plat or replat of any subdivision or portion of the city, unless such plan, plat or replat first shall have been recorded in the office of the recorder of deeds of the county in which such plat or replat is located. (R. O. 1956, § 54.040)

Sec. 31.5. Building permits.

The commissioner of buildings and inspections shall not issue building or repair permits for any structure located on a lot in any subdivision, the plat of which has been prepared after February 19, 1954, but which plat has not been approved or recorded in accordance with the provisions contained herein. (R. O. 1956, § 54.050)

Sec. 31.14. Approval necessary.

Before any plat of any subdivision referred to in section 31.6 shall be recorded or be of any validity, it shall have been approved by the city plan commission and by the director of public works, as having fulfilled the requirements of this chapter, and also the requirements of article XI and section 360 of the charter. (R. O. 1956, § 54.160)

Sec. 31.15. Conditions prerequisite to recording.

No plat of any subdivision shall be entitled to record in the county recorder's office or have any validity until the plat thereof has been prepared, approved and acknowledged in the manner prescribed by this chapter. (R. O. 1956, § 54.170)

CHARTER OF KANSAS CITY, MISSOURI ON PLATS AND ZONING

Sec. 359. State law to be followed; plats to be acknowledged.

Plats and maps of additions to the city or of subdivisions of land in the city, shall be made according to the general law of the state in force at the time. Such map or plat shall be acknowledged by the proprietor before some court or officer authorized by law to take the acknowledgement of conveyances of real estate, and recorded in the office of the recorder of deeds in Jackson County, Missouri.

Sec. 360. Approval of city plan commission and director of public works; grade to be agreed upon.

After the taking effect of this charter no plat of any addition to the city, or in the city, or of any subdivision of lands within the city, shall be recorded or be of any validity unless such plat shall have been submitted to the city plan commission, and its approval certified by the signature of the chairman endorsed thereon, and unless the approval of the director of public works shall also have been endorsed thereon. Before any such plat shall be approved by the director of public works and said commission, the streets, alleys and public highways shall be designated thereon and the grades thereof shall be determined by said director and agreed to by such proprietor, as the grade which shall be recommended to the council for establishment. Before approving any such plat the director of public works may require that said plat shall include the dedication of an easement in favor of the city on and in a strip not to exceed four (4) feet in width across the rear of each lot therein, or other convenient part thereof, to be designated by said director of public works, for the laying or constructing therein and thereon of sewers, conduits and pole lines; and he shall require that there be filed in his office a certificate from the proper person and authorities that all taxes and all liens and encumbrances of every sort on that part of the land dedicated or conveyed for public use have been satisfied of record.

Sec. 361. City may grade; easements for lateral support; no damages to be allowed when.

After any street, alley or public highway shall have been dedicated by any map or plat or by a conveyance to the city of any land for such use, the grades of the streets, alleys and public highways thereon shall be established by

ordinance. The city shall have an easement upon the land abutting on the said streets, alleys and public highways, permitting the city to use so much of said lands as may be necessary to provide adequate support for any fills made in grading said streets, alleys, and public highways to such established grade; or if the same may be done without substantial injury to any improvements thereon, the city may grade the front of any such abutting land sufficiently to prevent earth and other substances from sliding into such streets, alleys and public highways in cases where such grade leaves the abutting property above ground. In lieu of such easement retaining walls may be constructed at their own expense and on their own land by the owners or proprietors of said abutting lands according to plans approved by the director of public works, such construction to be done under his supervision and control. Said walls may be so constructed at the time said grading is done or at any time thereafter in the discretion of said owner or proprietor. The city shall have the right to grade or otherwise improve the said streets, alleys and public highway to such established grade; and if such established grade be that which was agreed to by the proprietor of the lands platted at the time of such platting as aforesaid, same may be done without making compensation for damages therefor to other lands of the proprietor making the map or plat, or to other lands of the maker of the conveyance, and it shall be deemed and taken by all courts for all purposes, that just compensation was made for such damages and for said easements when such map or plat or conveyance was made, or that the right to the same was released, so that neither the original proprietor, nor anyone holding under such proprietor, shall have a right to compensation for such damages; provided however, that if, after the city shall have established the grade of any such street, alley or

public highway as aforesaid, the city shall change such grade and regrade the same, just compensation shall be made for damages resulting to any property from such change of grade and regrading, to be determined as hereinbefore provided in this charter.

Sec. 362. Power to vacate streets and public places; approval of city plan commission.

The city shall have exclusive control of all its public highways, streets, alleys, boulevards, parkways and public places, and shall have exclusive power to vacate or abandon any public highway, street, alley or public place, or any part thereof, and to vacate any platted addition or subdivision of land or part thereof within the corporate boundaries of the city; provided, that no such vacation or abandonment shall take place except by ordinance; and provided further, that no such ordinance shall be passed or take effect unless and until the recommendation of the city plan commission, evidenced by the signature of the chairman thereof, approving or disapproving such ordinance, shall have been endorsed thereon.

Sec. 400. Organization and powers.

There shall be a city plan commission consisting of eight (8) members who shall serve without pay and who shall be appointed by the mayor. The mayor shall designate one of such members as chairman of the commission. The members of the city plan commission at the time this charter takes effect shall constitute the first commission hereunder for the remainder of their terms. Appointment of successors shall be for a term of four (4) years, said term beginning on the tenth day of April in the year the appointment is made. In addition, the city manager, president of the board of park commissioners, director of public works, director of the water department, and director of

welfare shall be advisory members without vote. The commission shall have power to prepare or recommend plans for:

(a) The location, extension, widening, construction, or improvement of streets, trafficways, boulevards, parks, playgrounds, community centers, other recreation facilities, public buildings, bridges, viaducts and subways;

(b) A system or systems of widening and opening various through streets so as to relieve traffic congestion;

(c) Matters of transit and transportation;

(d) Districting and zoning the city as to use to which property may be put, and regulating the height, area and use of buildings and premises;

(e) The improvement of the river front and flood protection;

(f) The supervision and regulation of platting and opening subdivisions;

(g) The future physical development of the city.

Sec. 401. Zoning.

The commission shall have power to prepare plans, reports and ordinances and to make recommendations thereon relating to the exercise of zoning powers as provided in this charter or by the laws of the state, particular reference being had herein to the exercise of the powers of the kind and character enumerated in clause fifty-five of section 1 of this charter.

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No. 645

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to this Court's order of April 22, 1968, requesting the views of the parties as to the effect, if any, of the enactment of the Civil Rights Act of 1968 on this case. Having filed a brief *amicus curiae* in support of the petitioners and participated in the oral argument of the cause, we believe it appropriate that the United States address itself to the question.

In 1965, petitioners sought to purchase a lot and home in respondents' Paddock Woods development. Their offer was refused solely on the ground of Mr. Jones' race. Believing that such a refusal to sell violated rights protected by the Constitution and laws of

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the United States, petitioners instituted this suit seeking injunctive relief and damages. They asked the district court for an order requiring that they be sold the "Hyde Park"[1] type of home on Lot No. 7147, or "some other lot in said subdivision sufficient to accommodate the home selected * * *." They claimed actual damages in the amount of $50.00 and sought punitive damages of $10,000.00. In addition, the complaint requested a permanent injunction enjoining future discrimination by respondents on the basis of race, color, creed, religion or national origin in the sale of homes in the Paddock Woods subdivision.

On April 11, 1968, the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73, became law. Title VIII of the Act[2] is a "Fair Housing" statute which, in progressive stages, establishes a right under federal law not to be denied housing on account of race, color, religion or national origin.

1. So far as petitioners' own claim is concerned, the new statute provides no immediate remedy. Currently, the Act bars only racial discrimination in housing which is governmentally owned or operated, which is financed through federal assistance or with loans insured by a federal agency, or which is part of an urban renewal or slum clearance program. Paddock Woods does not meet any of these criteria. From what is known of respondents' development, it appears

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[1] The complaint alleged that said model home could be "built and sold" to petitioners, at the time their offer to buy was made, for a total price of $28,195.

[2] The entire Title is printed as an appendix to this brief.

that it will not be covered by the Act until January 1, 1969, at which time Section 803(b)(1), which provides for coverage of single-family houses sold or rented by an owner who owns more than three such homes, will take effect.

Moreover, even if petitioners are prepared to wait until January 1 to renew their request to purchase a home in Paddock Woods, the remedy then available under the new statute may be less, in certain particulars, than a present decree would afford. *First,* if petitioners prevail in the present action, they will be entitled to purchase a home at the price prevailing at the time of the wrongful refusal in 1965, whereas if their right is measured by the 1969 price of the same home, there is likely to be a substantial difference in petitioners' cost. *Second,* petitioners' prayer for actual and punitive damages as a result of the original refusal would fall if the judgment of the court below were left undisturbed, and they were required to reapply for a home after January 1, 1969. And since Section 812 of the new Act sets a $1,000 ceiling on any award of punitive damages, even a second refusal would provide no basis for the damage prayer that petitioners have made. *Finally,* there is no way of knowing whether homes of the kind sought by petitioners—or indeed any other homes—will still be available at Paddock Woods as of January 1, 1969. The Act applies, of course, only to available housing.

2. What has been said indicates that the case is not moot as it affects the parties and others similarly

situated.[3] On the other hand, it is clear that the passage of the Civil Rights Act of 1968 has substantially diminished the public importance of the questions presented by the case. For the future, in progressive stages, the new legislation meets the major problem of discrimination in the sale and rental of housing. There are, however, differences between the coverage of the Act and the scope of possible rulings here that should be noticed.

A holding that the Fourteenth Amendment itself barred the discrimination in this case might well have certain added consequences. The right so declared could of course be asserted in State and federal forums and would be subject to none of the time limitations and other conditions imposed by the new statute. More significantly, perhaps, a decision by this Court on constitutional grounds might result in direct remedial action by State and local legislatures and enforcement by local governmental and administrative bodies. Also, a constitutional footing would secure the right against any possible future legislative termination.

[3] It is of course true that the legal framework has changed since this suit was instituted. Respondents are now in a position to consider whether the passage of the new Act, which will force a change of their policy eight months hence, would warrant approval of petitioners' request for a home if such a request were made today. Petitioners, by the same token, may consider whether they would be prepared to accept a home similar to the requested one if it were offered today in full settlement of the dispute, in view of the fact that the new Act, in effect, affords them, as of January 1, 1969, the permanent injunctive relief sought by the complaint. However, only the immediate parties are in a position to advise the Court on this subject.

Similarly, a holding that Section 1978 of the Revised Statutes (42 U.S.C. 1982) affords relief here might have a broader scope than the new statute. Although we suggested that, in the circumstances of this case, the Court need not decide whether Section 1978 reached more than a wholesale fencing-out of a racial class from an entire community, petitioners and other *amici* argued for a broader reading. Moreover, even on our more limited submission, Section 1978 would bar the concerted action of individual property owners to exclude Negroes from a substantial area, whereas it does not appear that the new legislation would reach such conduct until January 1, 1970, and then only if commercial brokers or restrictive advertising were involved. See § 803(b)(1).

Respectfully submitted.

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Attorney General.
ERWIN N. GRISWOLD,
Solicitor General.

MAY 1968.

APPENDIX

TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968, PUBLIC LAW 90-284, 82 STAT. 73

TITLE VIII—FAIR HOUSING

POLICY

SEC. 801. It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

DEFINITIONS

SEC. 802. As used in this title—

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trust, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, or 806.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

EFFECTIVE DATES OF CERTAIN PROHIBITIONS

SEC. 803. (a) Subject to the provisions of subsection (b) and section 807, the prohibitions against discrimination in the sale or rental of housing set forth in section 804 shall apply:

(1) Upon enactment of this title, to—

(A) dwellings owned or operated by the Federal Government;

(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government, under agreements entered into after November 20, 1962, unless payment due thereon has been made in full prior to the date of enactment of this title;

(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government, under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to the date of enactment of this title: *Provided,* That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue

of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b).

(b) Nothing in section 804 (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: *Provided,* That such private individual owner does not own more than three such single-family houses at any one time: *Provided further,* That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: *Provided further,* That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: *Provided further,* That after December 31, 1969, the sale

or rental of any such single-family house shall be excepted from the application of this title only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 804(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

(c) For the purposes of subsection (b), a person shall be deemed to be in the business of selling or renting dwellings if—

(1) he has within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving

the sale or rental of any dwelling or any interest therein, or

(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

DISCRIMINATION IN THE SALE OR RENTAL OF HOUSING

SEC. 804. As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

DISCRIMINATION IN THE FINANCING OF HOUSING

SEC. 805. After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: *Provided,* That nothing contained in the section shall impair the scope or effectiveness of the exception contained in section 803(b).

DISCRIMINATION IN THE PROVISION OF BROKERAGE SERVICES

SEC. 806. After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin.

EXEMPTION

SEC. 807. Nothing in this title shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons, of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this title prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

ADMINISTRATION

SEC. 808. (a) The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

(b) The Department of Housing and Urban Development shall be provided an additional Assistant Secretary. The Department of Housing and Urban Development Act (Public Law 89–174, 79 Stat. 667) is hereby amended by—

(1) striking the word "four," in section 4(a) of said Act (79 Stat. 668; 5 U.S.C. 624b (a)) and substituting therefor "five,"; and

(2) striking the word "six," in section 7 of said Act (79 Stat. 669; 5 U.S.C. 624(c)) and substituting therefor "seven."

(c) The Secretary may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this title. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105, 3344, 5362, and 7521 of title 5 of the United States Code. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(d) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary to further such purposes.

(e) The Secretary of Housing and Urban Development shall—

(1) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(2) publish and disseminate reports, recommendations, and information derived from such studies;

(3) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.

EDUCATION AND CONCILIATION

SEC. 800. Immediately after the enactment of this title the Secretary shall commence such educational and conciliatory activities as in his judgment will further the purposes of this title. He shall call conferences of persons in the housing industry and other interested parties to acquaint them with the provisions of this title and his suggested means of implementing it, and shall endeavor with their advice to work out programs of voluntary compliance and of enforcement. He may pay per diem, travel, and transportation expenses for persons attending such conferences as provided in section 5703 of title 5 of the United States Code. He shall consult with State and local officials and other interested parties to learn the extent, if any, to which housing discrimination exists in their State or locality, and whether and how State or local enforcement programs might be utilized to combat such discrimination in connection with or in place of, the Secretary's enforcement of this title. The Sec-

retary shall issue reports on such conferences and consultations as he deems appropriate.

ENFORCEMENT

SEC. 810. (a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c), the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) A complaint under subsection (a) shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title, the Secretary shall notify the appropriate State or local agency of any complaint filed under this title which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person ag-

grieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint: *Provided,* That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 812, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 812, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

INVESTIGATIONS; SUBPENAS; GIVING OF EVIDENCE

SEC. 811. (a) In conducting an investigation the Secretary shall have access at all reasonable times to premises, records, documents, individuals, and other

evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation: *Provided, however,* That the Secretary first complies with the provisions of the Fourth Amendment relating to unreasonable searches and seizures. The Secretary may issue subpenas to compel his access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpenas or interrogatories were issued or served in aid of a civil action in the United States district court for the district in which the investigation is taking place. The Secretary may administer oaths.

(b) Upon written application to the Secretary, a respondent shall be entitled to the issuance of a reasonable number of subpenas by and in the name of the Secretary to the same extent and subject to the same limitations as subpenas issued by the Secretary himself. Subpenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request.

(c) Witnesses summoned by subpena of the Secretary shall be entitled to the same witness and mileage fees as are witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpena issued at the request of a respondent shall be paid by him.

(d) Within five days after service of a subpena upon any person, such person may petition the Secretary to revoke or modify the subpena. The Secretary shall grant the petition if he finds that the subpena requires appearance or attendance at an un-

reasonable time or place, that it requires production of evidence which does not relate to any matter under investigation, that it does not describe with sufficient particularity the evidence to be produced, that compliance would be unduly onerous, or for other good reason.

(e) In case of contumacy or refusal to obey a subpena, the Secretary or other person at whose request it was issued may petition for its enforcement in the United States district court for the district in which the person to whom the subpena was addressed resides, was served, or transacts business.

(f) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if in his power to do so, in obedience to the subpena or lawful order of the Secretary, shall be fined not more than $1,000 or imprisoned not more than one year, or both. Any person who, with intent thereby to mislead the Secretary, shall make or cause to be made any false entry or statement of fact in any report, account, record, or other document submitted to the Secretary pursuant to his subpena or other order, or shall willfully neglect or fail to make or cause to be made full, true, and correct entries in such reports, accounts, records, or other documents, or shall willfully mutilate, alter, or by any other means falsify any documentary evidence, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(g) The Attorney General shall conduct all litigation in which the Secretary participates as a party or as amicus pursuant to this Act.

ENFORCEMENT BY PRIVATE PERSONS

SEC. 812. (a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in

appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 810(d) from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more

than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

ENFORCEMENT BY THE ATTORNEY GENERAL

SEC. 813. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this title.

EXPEDITION OF PROCEEDINGS

SEC. 814. Any court in which a proceeding is instituted under section 812 or 813 of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited.

EFFECT ON STATE LAWS

SEC. 815. Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guar-

antees, or protects the same rights as are granted by this title; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid.

COOPERATION WITH STATE AND LOCAL AGENCIES ADMINISTERING FAIR HOUSING LAWS

SEC. 816. The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this title. In furtherance of such cooperative efforts, the Secretary may enter into written agreements with such State or local agencies. All agreements and terminations thereof shall be published in the Federal Register.

INTERFERENCE, COERCION, OR INTIMIDATION

SEC. 817. It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806. This section may be enforced by appropriate civil action.

APPROPRIATIONS

SEC. 818. There are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this title.

SEPARABILITY OF PROVISIONS

SEC. 819. If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

SUPREME COURT, U. S.

MAY 10 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,

Respondents.

MEMORANDUM *AMICUS* IN RESPONSE TO REQUEST OF COURT FOR ADVICE ON EFFECT, IF ANY, THE ENACTMENT OF THE CIVIL RIGHTS ACT OF 1968 HAS UPON THIS LITIGATION

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MEMORANDUM *AMICUS* IN RESPONSE TO REQUEST OF COURT FOR ADVICE ON EFFECT, IF ANY, THE ENACTMENT OF THE CIVIL RIGHTS ACT OF 1968 HAS UPON THIS LITIGATION

Statement of the *Amici*

The *amici* in whose behalf this memorandum is submitted have filed a brief on the substantive issues in this case. In that brief they set forth the grounds for their interest in the issues raised in this case and their strong belief in the current validity and constitutionality under the Thirteenth Amendment of Section 1982 of Title 42 of the United States Code. They are, of course, pleased to note that the Congress has taken action in 1968 to provide

new sanctions under federal law against some aspects of housing discrimination based on race, color, religion or national origin. But they believe that this action does not replace or in any way minimize the legal impact and enforcibility of Section 1982 of Title 42. They are, therefore, presenting to the Court as *amici* their views on the question raised by the Court in its order of April 22, 1968.

Statement of the Question

The complaint in this case charges that the defendants' concerted willful refusal to sell a house and lot to plaintiffs, husband and wife, solely because of the husband's race (he is a Negro) violated their rights, privileges and immunities under the Civil Rights Act of 1866 (42 U.S.C. Sec. 1982) which guarantees all citizens a right to purchase real property equal to that enjoyed by white citizens. The complaint also charged violation of other post-Civil War civil rights acts and of the Thirteenth and Fourteenth Amendments.

The complaint alleges a refusal by defendants because of plaintiff husband's race to sell a lot selected by plaintiffs after inspection of the lots offered for sale in the defendants' subdivision involved in the action, Paddock-Woods. There was a concomitant refusal to build a type of house selected by plaintiffs from display homes on the site. The complaint concludes with a prayer for an injunction preventing the defendants from failing to reserve Lot No. 7147, the lot selected by plaintiffs and from refusing to build on the said lot a "Hyde Park" model three-bedroom home, a type of home defendants were offering to build, the home type selected by plaintiffs. The complaint also seeks

actual damages of $50 plus punitive damages of $10,000 for defendants' deprivation of plaintiffs' rights.

Shortly after oral argument of this case, the Congress of the United States passed and the President signed Public Law 90-284, Title VIII of which deals with fair housing. Section 801 thereof proclaims the policy of the United States to provide, "within constitutional limitations," for fair housing throughout the United States. Section 802 provides that the ban on certain forms of housing discrimination is to go into effect in three stages. The first stage occurs on the signing of the bill into law (April 11, 1968) and bars discrimination in federally owned or operated housing and federally assisted housing. (The subdivision of Paddock Woods received no form of federal assistance sufficient to subject it to the bans of this provision). The second stage occurs on January 1, 1969 and subjects all housing other than any single-family house sold or rented by an owner who does not own more than three single-family houses at any one time and rooms or units in dwellings containing living quarters for no more than four families, if the owner occupies one of such living quarters as his residence, to the ban against discrimination based on race, color, religion, or national origin. Hence if Paddock Woods is not fully sold out by January 1, 1969, and the defendants own three or more houses therein, the Act would be applicable to them. The third stage occurs on January 1, 1970, when sales or rentals of single-family homes are covered unless such sale or rental is made without the use of any real estate broker or salesman or of any person in the business of selling or renting dwellings and without the use of any advertisement or notice involving discretionary

specifications based on race, color, religion or national origin.

The provisions of the Act are enforcible by various means. The Secretary of Housing and Urban Development may investigate complaints of violation by persons claiming to have been injured by a discriminatory housing practice. He may seek to adjust such complaints by conference, conciliation and persuasion. The person aggrieved may, after a thirty day waiting period, bring action in the federal courts which may, in certain circumstances, enjoin the respondents from engaging in the discriminatory practice objected to or order such affirmative relief as may be appropriate, subject to the condition that any sale or rental consummated prior to the issuance of any court order issued under the Act involving a bona fide purchaser or tenant without actual notice of the existence of the complaint or civil action under the Act shall not be affected.

The question to which this Memorandum *amicus* is directed is the effect, if any, that the Act described in relevant part above, has upon the issues in this case.

Summary of the Argument

The enactment of Title VIII of the Civil Rights Act of 1968 has no effect on the litigation in *Jones* v. *Alfred H. Mayer Company* because Title VIII is not only not retroactive; it is purely prospective except for federally aided housing, not here involved, which it covers from the date of its enactment. Nothing in the 1968 Act would be effective to provide plaintiffs and others in the same situation

as plaintiffs with any remedy for the violations of their civil rights they have previously suffered.

Even though it is clear that Title VIII does not cover the racially discriminatory acts to which petitioners have been subjected and of which they complain in this case, it might be argued that the adoption of Title VIII reflected a congressional view that the 1866 Act either did not apply to the sales and rentals covered by Title VIII or an intent of Congress to limit the coverage of the 1866 Act to housing covered by Title VIII. But it is noteworthy that even though mention was made of the pendency of this case in the Senate Committee hearings on Title VIII, there is no express reference to the 1866 Act in the current act nor is there any indication in the statute or the debates of any congressional intent to repeal it. Further such a repeal by implication is not favored: An intent to repeal must be clear and manifest. Section 109 of Title I of the United States Code reinforces this view.

The objective of the Civil Rights Act of 1968, including Title VIII thereof, is different from that of the Civil Rights Act of 1866. The latter act, including the portion of it preserved in Sec. 1982 of Title 42 of the U. S. Code, was adopted to implement the abolition of human slavery and involuntary servitude pronounced by the Thirteenth Amendment. Its purpose was to eliminate the badges and vestiges of Negro slavery. It was included to guarantee the fundamental rights seen as essential for human freedom and decency and necessary to secure the basic rights of United States citizens including the same rights to purchase and lease real property as were exercised by white citizens.

Title VIII of the 1968 Act, on the other hand, was enacted to deal with the problems arising out of the existence in many American cities and towns of racial ghettos which developed because of patterns of racial discrimination in housing and economic discrimination and disabilities to which many American of Negro origin are now being subjected. Whereas the 1866 Civil Rights Act was concerned essentially with protecting basic individual rights essential to citizenship, the 1968 Act is concerned with insuring proper relations between groups.

A principal issue in this case is whether Congress, in enacting the 1866 Civil Rights Act, had the constitutional authority to make it applicable to racial discrimination by private individuals in the sale or lease of real property. Petitioners, respondents and the *amici* sponsoring this memo all expressed the view that Section 2 of the Thirteenth Amendment conferred such authority. The same question arises whenever a statute seeking to secure civil rights imposes obligations on individuals acting in their private capacity without any definite determination that the individual action involves "to some significant extent" any manifestations of state action (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961)). Title VIII of the 1968 Civil Rights Act might well raise the same problem. There are provisions of it which seem to be applicable to actions by individuals, not involving the state to some significant extent. Hence a decision on this aspect of the case may well help anticipate and resolve some of the issues of constitutionality which might arise with respect to Title VIII.

I

The enactment of Title VIII of the Civil Rights Act of 1968 has no effect on the litigation in this case.

Title VIII of the Civil Rights Act of 1968 is purely prospective in impact and can have no retroactive effect. It can become applicable to housing of the type involved in this case only on January 1, 1969 since that housing, as was conceded by the parties in the argument of this case before this Court, involves p[illegible]form of federal aid and is not, therefore, subject to the limitations of Title VIII when that provision wei[illegible] into effect on the President's signing it on April 11.

Furthermore, the petitioners herein seek both an injunction against respondents' failing to reserve the lot they had selected as the one they wished to buy, Lot No. 7147, in Paddock Woods, a lot offered for sale by respondents, and against respondents' refusing to erect thereon the home petitioners had indicated they wished respondents to build on the lot, a type of home offered for sale by respondents. Petitioners also seek damages for the denial by respondents of their civil rights guaranteed by the 1866 Civil Rights Act and the other acts cited in the complaint and by the Thirteenth and Fourteenth Amendments.

While there is provision for assessment of actual damages and punitive damages of not more than $1,000 in civil suits brought by private persons to enforce rights granted by Title VIII of the Civil Rights Act of 1968 (see Sec. 812(c)), this would require petitioners to initiate a new suit under that act. And the damages they seek in the instant

case of $50 actual damages and $10,000 punitive damages would clearly be inapplicable under the law since such damages would have to be measured from the date of creation of the rights established by the 1968 Act. The violation occurring in 1965 of their rights under the 1866 Act would go unrecompensed. And while there is provision for issuance of an injunction in Section 810(d) and Section 812(c) this right applies only to housing subject to the bans of the Act and the housing here in question is not now subject to those bans and there is no certainty that it will become subject to those bans in the future. Nothing in the record indicates that the entire Paddock Woods project may not have been completely sold to individual buyers by the respondents by January 1, 1969 in which case the Act would not apply to the project even on January 1, 1969. Neither is there anything in the record of this case to permit the inference that respondents may not have sold the lot in issue to a purchaser without notice of the petitioners' claim, thus preventing the effective imposition of the injunction sought. (See Sec. 812(a)). The provision for imposition of compensatory damages (Sec. 812(c)) limits punitive damages to $1,000 whereas petitioners here seek $10,000 in damages. And even such damages would be assessable only if petitioners, after January 1, 1969, renew their effort to purchase a lot and home in Paddock Woods, find such lots and houses are still for sale, and are rejected again because of race. In this connection, it must be noted that respondents, having been forewarned, may be less willing to spell out their reason for rejecting petitioners' application to purchase and thus increase the burden, if not make it impossible for petitioners to prove that this latest rejection made after January 1, 1969, stemmed from racial

discrimination. Hence, if petitioners cannot obtain relief in the instant suit for the injury done them in February 1965 in violation of their civil rights established under the Civil Rights Act of 1866 and the Thirteenth Amendment, they may well be left without any effective remedy since the Civil Rights Act of 1968 has no provisions which insure them a remedy for that wrong. It would be truly ironic if the enactment of a new law aimed at remedying the evils of racial segregation in housing were to become the device by which petitioners, who are complaining of racial discrimination in the denial of their civil right to purchase real property on the same basis as white citizens, are denied a remedy for violation of that right.

II

The enactment of the Fair Housing provisions of the Civil Rights Act of 1968 can in no way be interpreted as repealing or limiting the coverage or applicability of the ban against discrimination on the basis of race in Section 1982 of Title 42 of the United States Code (derived from the Civil Rights Act of 1866) in the sale or lease of real property.

As has been stressed in the briefs of the petitioners herein and of several of the *amici*, including those subscribing to this memorandum, Section 1982 of Title 42 of the U. S. Code applies to all sales of real property, unlike the provisions of Title VIII of the Civil Rights Act of 1968. And unlike the latter act which applies to discrimination based on religion and national origin as well as on race or color, Section 1982 operates on its face to bar only discrimination based on color or race. These differences may

well serve as the basis for an argument by respondents that when Congress adopted the 1968 Act it thereby either limited or even repealed the long-standing provision of the 1866 Civil Rights Act embodied in Section 1982.

This view, it is submitted, is without basis in fact or in law. The provisions of Section 1982 clearly prohibit racial discrimination in all sales and leases of real estate. The provisions of the Fair Housing title of the 1968 Act prohibit racial discrimination only in some housing. It is submitted that the latter act, insofar as it prohibits racial discrimination in housing, is merely cumulative, repeating some of the prohibitions of the 1866 Act, and serves, in this respect, to add additional administrative enforcement devices to establish specific authority for enforcement by action in federal courts, to provide for cooperation in enforcement with state and local anti-discrimination agencies and to add, in the case of the types of housing covered, a ban against discrimination based on religion and national origin.

It is clear that the 1968 Act contains no express repeal of the existing law against racial discrimination in housing. Nor can repeal by implication be inferred. Repeal by implication is not favored in our legal system. *Rosenberg* v. *U. S.*, 346 U. S. 273, 294 (1953); *U. S.* v. *Borden*, 308 U. S. 188, 198 (1939).

Looking to legislative intent to determine whether the later enactment of a statute dealing with the same general subject as an earlier statute was intended as a repeal by implication, we find that this Court has said that such an intent to repeal the earlier statute must be "clear and

manifest''. And such an intent is established usually if there is an irreconcilable conflict between the old law and the new law. *Posada* v. *Nat'l City Bank*, 296 U. S. 497, 503 (1936). There is no inconsistency between the two laws here under examination.

It is noteworthy that even though mention was made of the pendency of the instant case and its 1866 Civil Rights Act and Thirteenth Amendment aspect in the hearings before a Senate Subcommittee considering the bill which ultimately became Title VIII of the 1968 Act (see Hearings, Subcommittee on Housing and Urban Affairs, S.1358, S.2114 and S.2280, Aug. 21, 22, 23, 1968, p. 229), there is no express reference to the 1866 Act in the 1968 Act, nor is there any indication in the 1968 Act itself or in the debates on the floor of Congress of any intent to repeal or limit the 1866 Act. Rather, in the hearing on the proposal, interest was expressed in the possibility of the 1866 Act being an alternative device for dealing with the problem of racial segregation in housing, which, if upheld by this Court, might help solve that problem.

The reluctance of Congress to extinguish existing rights even when it does specifically repeal a statute, something it did not do in the case of the 1866 Civil Rights Act, is reinforced by Section 109 of Title 1 of the U. S. Code which provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

III

Section 1982 of Title 42 of the United States Code derived from the Civil Rights Act of 1866 and Title VIII of the Civil Rights Act of 1968 are substantially different in objective and in the means each establishes to achieve that objective and are in no way in conflict or inconsistent.

Section 1982 of Title 42 of the United States Code derives from the Civil Rights Act of 1866 enacted under the authority of Section 2 of the Thirteenth Amendment was adopted to implement the abolition of Negro slavery pronounced by that Amendment. The Civil Rights Act of 1866 declared the freed slaves to be citizens of the United States and undertook to secure for them the fundamental rights considered to be the minimum essentials of such citizenship. One such right was to inherit, purchase, lease, sell, hold and convey real property, a right generally denied to slaves under state law at the time of the adoption of the Thirteenth Amendment. This was one of the badges or incidents of slavery which the authors and enactors of the Civil Rights Act of 1866 recognized as a disability which must be eliminated if the freed slaves were to become truly free men and citizens of the United States. This right, like the other rights established by that Act, was viewed by Congress as one which must be guaranteed by federal power to every individual if that individual was to live as a free citizen. That is made clear by the very language of the statute which talks of the right of "all citizens of the United States." At that time there was no general pattern of racial segregation in housing in the United

States. But there were patterns of law and practice which barred Negroes from purchasing real property, from suing and testifying as witnesses. The problem then was not, as the brief *amicus* of the Department of Justice suggests, one of fencing the freed slaves out of the community, but rather one of guaranteeing to them the exercise of rights as individuals necessary to allow them to live in the community as free men. One important right was that protected by the portion of the Civil Rights Act of 1866 now embodied in Section 1982 of Title 42. When this law was adopted the concepts of fencing people out of the community on the basis of race and of dealing with racial segregation in housing by fair housing legislation were not known. Neither was there any claim that racial discrimination in the sale of housing could be dealt with by offering those discriminated against a "comparable" house at a "comparable" price. Rather the concept of the uniqueness of every piece of real property was even more deeply imbedded in our common law then than it is now.

In essence, the Civil Rights Act of 1866 sought to deal with the problem as one involving protection of the rights of individuals, not one involving intergroup relations. The issue was not one of relations between groups, nor of fear of riot or violence. The 1866 Act was intended to assist the freed slaves in their individual progress toward full participation as citizens and free men in our American society.

Title VIII of the Civil Rights Act of 1968, on the other hand, arose out of the recognition of the need to deal with the problems of the racial ghettos which had grown up in

almost every one of our major cities, a problem intensified by the growth around most of those cities of a ring of white suburbs which intensified the pattern of racial segregation made manifest by the racial ghetto. The Harlems and Wattses are only in part the result of a persistent pattern of denial to Negroes of their right to equality of housing opportunity. They are also the result of the poverty and other economic and cultural deprivations by which most Negroes in our country are oppressed to a substantial extent. The racial tension resulting, as the Kerner Commission has reported, both from the confinement of the Negro to the racial ghetto and the patterns of white racism which tend to perpetuate these evils, is what led Congress to adopt the Civil Rights Act of 1968, the fair housing provisions of which seek to deal with those tensions and to lay the basis for improving relationships between the racial groups comprising our population. The 1866 Act declared individual rights. The 1968 Act sought to eliminate the sources of racial violence and group unrest. Each can work in its sphere, and neither limits the other. Of course, the remedies established under the 1968 Act might be of use in assuring observance of the individual rights established under the 1866 Act. There is no conflict or contradiction between them. They can serve as complementary means to implement the guarantees of both the Thirteenth and Fourteenth Amendments.

IV

A ruling that Section 1982 of Title 42 is constitutional under the Thirteenth Amendment and applies to all sales of real property by private individuals would establish a strong precedent for the constitutional validity of the Fair Housing provisions of the Civil Rights Act of 1968 and thus minimize the danger of disregard of the provisions of that Act.

A principal issue in the instant case, the principal issue in the view of the *amici* subscribing to this brief, is the constitutional authority of Congress under the Thirteenth Amendment to enact legislation directed against discrimination based on race or color by private individuals selling individually owned real property with no involvement whatsoever of "state action". Petitioners and respondents and the *amici* submitting this memorandum all expressed the view that Section 2 of the Thirteenth Amendment conferred such authority on Congress. Yet this Court has never ruled on this specific issue. Since the same question arises whenever Congress adopts a civil rights provision imposing obligations not to discriminate on the basis of race or color or religion or national origin on individuals acting in their private capacity without any indication that such action involves "to some significant extent" any manifestations of state action (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961), a decision in this case on this issue might well obviate many of the legal tests of constitutionality by litigations which would normally be expected to develop with respect to the Civil Rights Act of 1968 and especially Title VIII thereof. Cer-

tainly, if the Court, in this case, should rule that Congress has the authority under Section 2 of the Thirteenth Amendment, to enact Section 1982 of Title 42 of the U. S. Code barring racial discrimination in all sales of real property, it would follow, *a fortiori,* that Congress has the power to enact legislation which, in a more limited fashion, bars aspects of such discrimination as well as discrimination based on religion and national origin and has authority also to establish additional administrative machinery to enforce such a ban, as well as judicial machinery for the same purpose.

This is not to say that there may not be other more or less effective constitutional grounds for upholding the fair housing provisions of the Civil Rights Act of 1968. Some of these grounds are spelled out in Point II of the brief *amicus* submitted by the *amici* subscribing to this Memorandum and in footnote 119 appearing at pp. 83 and 84 thereof. But a ruling with respect to the impact of the Thirteenth Amendment on the federal power to bar racial discrimination in the fundamental field of access to possession of real property would, it is submitted, help resolve this important issue and enable the federal power to be invoked most effectively in dealing with major aspects of our current urban crisis.

Conclusion

The enactment of the Civil Rights Act of 1968 in no way serves to weaken or lessen the urgency and importance of this Court's resolving the issues raised in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, *v.* Alfred H. Mayer Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

In this case we are called upon to determine the scope and the constitutionality of an Act of Congress, 42 U. S. C. § 1982, which provides that:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief.[1] The District Court sustained the respondents' motion to

[1] To vindicate their rights under 42 U. S. C. § 1982, the petitioners invoked the jurisdiction of the District Court to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." 28 U. S. C. § 1343 (4). In such cases, federal jurisdiction does not require that the amount in controversy exceed $10,000. Cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 161; *Hague* v. *C. I. O.*, 307 U. S. 496, 507–514, 527–532.

dismiss the complaint,[2] and the Court of Appeals for the Eighth Circuit affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell.[3] We granted certiorari to consider the questions thus presented.[4] For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.[5]

I.

At the outset, it is important to make clear precisely what this case does *not* involve. Whatever else it may be, 42 U. S. C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73, the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.[6] It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling.[7] It does not prohibit advertising or other representations that indicate discriminatory preferences.[8] It does not refer explicitly

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[2] 255 F. Supp. 115.

[3] 379 F. 2d 33.

[4] 389 U. S. 968.

[5] Because we have concluded that the discrimination alleged in the petitioners' complaint violated a federal statute that Congress had the power to enact under the Thirteenth Amendment, we find it unnecessary to decide whether that discrimination also violated the Equal Protection Clause of the Fourteenth Amendment.

[6] Contrast the Civil Rights Act of 1968, § 804 (a).

[7] Contrast § 804 (b).

[8] Contrast §§ 804 (c), (d), (e).

to discrimination in financing arrangements[9] or in the provision of brokerage services.[10] It does not empower a federal administrative agency to assist aggrieved parties.[11] It makes no provision for intervention by the Attorney General.[12] And, although it can be enforced by injunction,[13] it contains no provision expressly authorizing a federal court to order the payment of damages.[14]

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[9] Contrast § 805.

[10] Contrast § 806. In noting that 42 U. S. C. § 1982 differs from the Civil Rights Act of 1968 in not dealing explicitly and exhaustively with such matters (see also nn. 7 and 9, *supra*), we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute "property" as that term is employed in § 1982. Nor do we intimate any view upon the extent to which discrimination in the provision of such services might be barred by 42 U. S. C. § 1981, the text of which appears in n. 78, *infra*.

[11] Contrast the Civil Rights Act of 1968, §§ 808–811.

[12] Contrast § 813 (a).

[13] The petitioners in this case sought an order requiring the respondents to sell them a "Hyde Park"-type of home on Lot No. 7147, or on "some other lot in [the] subdivision sufficient to accommodate the home selected . . . ." They requested that the respondents be enjoined from disposing of Lot No. 7147 while litigation was pending, and they asked for a permanent injunction against future discrimination by the respondents "in the sale of homes in the Paddock Woods subdivision." The fact that 42 U. S. C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy. See, *e. g.*, *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568-570; *Deckert* v. *Independence Corp.*, 311 U. S. 282, 288; *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491–492; *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432–435. Cf. *Ex parte Young*, 209 U. S. 123; *Griffin* v. *School Board*, 377 U. S. 218.

[14] Contrast the Civil Rights Act of 1968, § 812 (c). The complaint in this case alleged that the petitioners had "suffered actual damages in the amount of $50.00," but no facts were stated to support or explain that allegation. Upon receiving the injunctive relief to which they are entitled, see n. 13, *supra*, the petitioners

Thus, although § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968,[15] it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the law recently enacted by Congress. Indeed, the Senate Subcommittee on Housing and Urban Affairs was informed in hearings held after the Court of Appeals had rendered its decision in this case that § 1982 might well be "a presently valid federal statutory ban against discrimination by private persons in the sale or lease of real property."[16] The Subcommittee was told, however, that even if this Court should so construe § 1982, the existence of that statute would not "eliminate the need for congressional action" to spell out "responsibility on the part of the federal

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will presumably be able to purchase a home from the respondents at the price prevailing at the time of the wrongful refusal in 1965—substantially less, the petitioners concede, than the current market value of the property in question. Since it does not appear that the petitioners will then have suffered any uncompensated injury, we need not decide here whether, in some circumstances, a party aggrieved by a violation of § 1982 might properly assert an implied right to compensatory damages. Cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39–40; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 207; *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 202, 204. See generally *Bell* v. *Hood*, 327 U. S. 678, 684. See also 42 U. S. C. § 1988. In no event, on the facts alleged in the present complaint, would the petitioners be entitled to punitive damages. See *Philadelphia, Wilmington & Baltimore R. Co.* v. *Quigley*, 21 How. 202, 213–214. Cf. *Barry* v. *Edmunds*, 116 U. S. 550, 562–565; *Will* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 367–368. We intimate no view, however, as to what damages might be awarded in a case of this sort arising in the future under the Civil Rights Act of 1968.

[15] See §§ 803 (b), 807.

[16] Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 229. These hearings were a frequent point of reference in the debates preceding passage of the 1968 Civil Rights Act. See, *e. g.*, 114 Cong. Rec. S. 1387 (Feb. 16, 1968), S. 1453 (Feb. 20, 1968), S. 1641 (Feb. 26, 1968), S. 1788 (Feb. 27, 1968).

government to enforce the rights it protects." [17] The point was made that, in light of the many difficulties confronted by private litigants seeking to enforce such rights on their own, "legislation is needed to establish federal machinery for enforcement of the rights guaranteed under Section 1982 of Title 42 even if the plaintiffs in Jones v. Alfred H. Mayer Company should prevail in the United States Supreme Court." [18]

On April 10, 1968, Representative Kelly of New York focused the attention of the House upon the present case and its possible significance. She described the background of this litigation, recited the text of § 1982, and then added:

> "When the Attorney General was asked in court about the effect of the old law [§ 1982] as compared with the pending legislation which is being considered on the House floor today, he said that the scope was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary." [19]

Later the same day, the House passed the Civil Rights Act of 1968. Its enactment had no effect upon § 1982 [20]

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[17] Hearings, *supra*, n. 16, at 229.

[18] *Id.*, at 230. See also *id.*, at 129, 162–163, 251. And see Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 416.

[19] 114 Cong. Rec. H. 2807 (April 10, 1968). See also *id.*, at H. 2808. The Attorney General of the United States stated during the oral argument in this case that the Civil Rights Act then pending in Congress "would provide open housing rights on a complicated statutory scheme, including administrative, judicial, and other sanctions for its effectuation . . . ." "Its potential for effectiveness," he added, "is probably much greater than [§ 1982] because of the sanctions and the remedies that it provides."

[20] At oral argument, the Attorney General expressed the view that, if Congress should enact the pending bill, § 1982 would not be affected in any way but "would stand independently." That is, of course, correct. The Civil Rights Act of 1968 does not mention

and no effect upon this litigation,[21] but it underscored the vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority. Having noted these differences, we turn to a consideration of § 1982 itself.

II.

This Court last had occasion to consider the scope of 42 U. S. C. § 1982 in 1948, in *Hurd* v. *Hodge*, 334 U. S. 24. That case arose when property owners in the District of Columbia sought to enforce racially restrictive covenants against the Negro purchasers of several homes on their block. A federal district court enforced the restrictive agreements by declaring void the deeds of the Negro purchasers. It enjoined further attempts to sell or lease them the properties in question and directed them to "remove themselves and all of their personal belongings" from the premises within 60 days. The

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42 U. S. C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute. See *United States* v. *Borden Co.*, 308 U. S. 188, 198–199. See also § 815 of the 1968 Act: "Nothing in this title shall be construed to invalidate or limit any law of . . . any . . . jurisdiction in which this title shall be effective, that grants, guarantees, or protects the . . . rights . . . granted by this title . . . ."

[21] On April 22, 1968, we requested the views of the parties as to what effect, if any, the enactment of the Civil Rights Act of 1968 had upon this litigation. The parties and the Attorney General, representing the United States as *amicus curiae*, have informed us that the respondents' housing development will not be covered by the 1968 Act until January 1, 1969; that, even then, the Act will have no application to cases where, as here, the alleged discrimination occurred prior to April 11, 1968, the date on which the Act

Court of Appeals for the District of Columbia affirmed,[22] and this Court granted certiorari [23] to decide whether § 1982, then § 1978 of the Revised Statutes of 1874, barred enforcement of the racially restrictive agreements in that case.

The agreements in *Hurd* covered only two-thirds of the lots of a single city block, and preventing Negroes from buying or renting homes in that specific area would not have rendered them ineligible to do so elsewhere in the city. Thus, if § 1982 had been thought to do no more than grant Negro citizens the legal capacity to buy and rent property free of prohibitions that wholly disabled them because of their race, judicial enforcement of the restrictive covenants at issue would not have violated § 1982. But this Court took a broader view of the statute. Although the covenants could have been enforced without denying the general right of Negroes to purchase or lease real estate, the enforcement of those covenants would nonetheless have denied the Negro purchasers "the same right 'as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.'" 334 U. S., at 34. That result, this Court concluded, was prohibited by

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became law; and that, if the Act were deemed applicable to such cases, the petitioners' claim under it would nonetheless be barred by the 180-day limitation period of §§ 810 (b) and 812 (a).

Nor did the passage of the 1968 Act after oral argument in this case furnish a basis for dismissing the writ of certiorari as improvidently granted. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, relied upon in dissent, *post*, at 29–30, was quite unlike this case, for the statute that belatedly came to the Court's attention in *Rice* reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits. The coverage of § 1982, however, is markedly different from that of the Civil Rights Act of 1968.

[22] 162 F. 2d 233.

[23] 332 U. S. 789.

§ 1982. To suggest otherwise, the Court said, "is to reject the plain meaning of language." *Ibid.*

Hurd v. *Hodge, supra,* squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants "[s]olely because of [his] race and color," 334 U. S., at 34, has suffered the kind of injury that § 1982 was designed to prevent. Accord, *Buchanan* v. *Warley,* 245 U. S. 60, 79; *Harmon* v. *Tyler,* 273 U. S. 668; *Richmond* v. *Deans,* 281 U. S. 704. The basic source of the injury in *Hurd* was, of course, the action of private individuals—white citizens who had agreed to exclude Negroes from a residential area. But an arm of the Government—in that case, a federal court—had assisted in the enforcement of that agreement.[24] Thus *Hurd* v. *Hodge, supra,* did not present the question whether *purely* private discrimination, unaided by any action on the part of government, would violate § 1982 if its effect were to deny a citizen the right to rent or buy property solely because of his race or color.

The only federal court (other than the Court of Appeals in this case) that has ever squarely confronted that question held that a wholly private conspiracy among white citizens to prevent a Negro from leasing a farm violated § 1982. *United States* v. *Morris,* 125 F. 322. It is true that a dictum in *Hurd* said that § 1982 was directed only toward "governmental action," 334 U. S., at 31, but neither *Hurd* nor any other case

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[24] Compare *Harmon* v. *Tyler,* 273 U. S. 668, invalidating a New Orleans ordinance which gave legal force to private discrimination by forbidding any Negro to establish a home in a white community, or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected." See *Shelley* v. *Kraemer,* 334 U. S. 1, 12.

before or since has presented that precise issue for adjudication in this Court.[25] Today we face that issue for the first time.

III.

We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, "the same right" to purchase and lease property "as is enjoyed by white citizens." As the Court of Appeals in this case evidently recognized, that right can be impaired as effec-

[25] Two of this Court's early opinions contain dicta to the general effect that § 1982 is limited to state action. *Virginia* v. *Rives*, 100 U. S. 313, 317–318; *Civil Rights Cases*, 109 U. S. 3, 16–17. But all that *Virginia* v. *Rives*, *supra*, actually *held* was that § 641 of the Revised Statutes of 1874 (derived from § 3 of the Civil Rights Act of 1866 and currently embodied in 28 U. S. C. § 1443 (1)) did not authorize the removal of a state prosecution where the defendants, without pointing to any statute discriminating against Negroes, could only assert that a denial of their rights might take place and might go uncorrected at trial. 100 U. S., at 319–322. See *Georgia* v. *Rachel*, 384 U. S. 780, 797–804. And of course the *Civil Rights Cases*, *supra*, which invalidated §§ 1 and 2 of the Civil Rights Act of 1875, 18 Stat. 335, did not involve the present statute at all.

It is true that a dictum in *Hurd* v. *Hodge*, 334 U. S. 24, 31, characterized *Corrigan* v. *Buckley*, 271 U. S. 323, as having "held" that "[t]he action toward which the provisions of the statute . . . [are] directed is governmental action." 334 U. S., at 31. But no such statement appears in the *Corrigan* opinion, and a careful examination of *Corrigan* reveals that it cannot be read as authority for the proposition attributed to it in *Hurd*. In *Corrigan*, suits had been brought to enjoin a threatened violation of certain restrictive covenants in the District of Columbia. The courts of the District had granted relief, see 299 F. 899, and the case reached this Court on appeal. As the opinion in *Corrigan* specifically recognized, no claim that the covenants could not validly be *enforced* against the appellants had been raised in the lower courts, and no such claim was properly before this Court. 271 U. S., at 330–331. The only question presented for decision was whether the restrictive covenants *themselves* violated the Fifth, Thirteenth, and Fourteenth Amend-

tively by "those who place property on the market" [26] as by the State itself. For, even if the State and its agents lend no support to those who wish to exclude persons from their communities on racial grounds, the fact remains that, whenever property "is placed on the market for whites only, whites have a right denied to Negroes." [27] So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the *same* right . . . as is enjoyed by white citizens . . . to . . . purchase [and] lease . . . real and personal property." 42 U. S. C. § 1982. (Emphasis added.)

On its face, therefore, § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 "means what it says"—to use the words of the respondents' brief—then it must encompass every racially motivated refusal

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ments, and §§ 1977, 1978, and 1979 of the Revised Statutes (now 42 U. S. C. §§ 1981, 1982, and 1983. *Ibid.* Addressing itself to that narrow question, the Court said that none of the provisions relied upon by the appellants prohibited private individuals from "enter[ing] into [contracts] in respect to the control and disposition of their own property." *Id.*, at 331. Nor, added the Court, had the appellants even *claimed* that the provisions in question "had, in and of themselves, . . . [the] effect" of prohibiting such contracts. *Ibid.*

Even if *Corrigan* should be regarded as an adjudication that 42 U. S. C. § 1982 (then § 1978 of the Revised Statutes) does not prohibit private individuals from *agreeing* not to sell their property to Negroes, *Corrigan* would *not* settle the question whether § 1982 prohibits an *actual refusal to sell* to a Negro. Moreover, since the appellants in *Corrigan* had not even argued in this Court that the statute prohibited private agreements of the sort there involved, it would be a mistake to treat the *Corrigan* decision as a considered judgment even on that narrow issue.

[26] 379 F. 2d 33, 43.

[27] *Ibid.*

to sell or rent and cannot be confined to officially sanctioned segregation in housing. Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.

IV.

In its original form, 42 U. S. C. § 1982 was part of § 1 of the Civil Rights Act of 1866.[28] That section was cast in sweeping terms:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[29]

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[28] Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, re-enacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U. S. C. §§ 1981 and 1982. For the text of § 1981, see n. 78, *infra*.

[29] It is, of course, immaterial that § 1 ended with the words "any law, statute, ordinance, regulation, or custom, to the contrary not-

The crucial language for our purposes was that which guaranteed all citizens "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . . ." To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by "State or local law" but also by "custom, or prejudice." [30] Thus, when Congress provided in § 1 of the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citi-

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withstanding." The phrase was obviously inserted to qualify the reference to "like punishment, pains, and penalties, and to none other," thus emphasizing the supremacy of the 1866 statute over inconsistent state or local laws, if any. It was deleted, presumably as surplusage, in § 1978 of the Revised Statutes of 1874.

[30] Several weeks before the House began its debate on the Civil Rights Act of 1866, Congress had passed a bill (S. No. 60) to enlarge the powers of the Freedmen's Bureau (created by Act of March 3, 1865, c. 90, 13 Stat. 507) by extending military jurisdiction over certain areas in the South where, "in consequence of any State or local law, . . . *custom, or prejudice*, any of the civil rights . . . belonging to white persons (including the right . . . to inherit, purchase, lease, sell hold, and convey real and personal property . . .) are refused or denied to negroes . . . on account of race, color, or any previous condition of slavery or involuntary servitude . . . ." See Cong. Globe, 39th Cong., 1st Sess., 129, 209. (Emphasis added.) Both Houses had passed S. No. 60 (see *id.*, at 421, 688, 748, 775), and although the Senate had failed to override the President's veto (see *id.*, at 915–916, 943) the bill was nonetheless significant for its recognition that the "right to purchase" was a right that could be "refused or denied" by "custom or prejudice" as well as by "State or local law." See also the text accompanying nn. 49 and 59, *infra*. Of course an "abrogation of civil rights made 'in consequence of . . . custom, or prejudice' might as easily be perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance." J. tenBroek, Equal Under Law 179 (1965 ed.).

zens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private.[31]

Indeed, if § 1 had been intended to grant nothing more than an immunity from *governmental* interference, then much of § 2 would have made no sense at all.[32] For that section, which provided fines and prison terms for certain

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[31] When Congressman Bingham of Ohio spoke of the Civil Rights Act, he charged that it would duplicate the substantive scope of the bill recently vetoed by the President, see n. 30, *supra*, and that it would extend the territorial reach of that bill throughout the United States. Cong. Globe, 39th Cong., 1st Sess., 1292. Although the Civil Rights Act, as the dissent notes, *post*, at 9, 13, made no explicit reference to "prejudice," cf. n. 30, *supra*, the fact remains that nobody who rose to answer the Congressman disputed his basic premise that the Civil Rights Act of 1866 would prohibit every form of racial discrimination encompassed by the earlier bill the President had vetoed. Even Senator Trumbull of Illinois, author of the vetoed measure as well as of the Civil Rights Act, had previously remarked that the latter was designed to "extend to all parts of the country," on a permanent basis, the "equal civil rights" which were to have been secured in rebel territory by the former, *id.*, at 322, to the end that "*all* the badges of servitude . . . be abolished." *Id.*, at 323. (Emphasis added.)

[32] Section 2 provided:

"That any person who, *under color of any law, statute, ordinance, regulation, or custom,* shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court." (Emphasis added.)

For the evolution of this provision into 18 U. S. C. § 242, see *Screws* v. *United States*, 325 U. S. 91, 98–99; *United States* v. *Price*, 383 U. S. 787, 804.

individuals who deprived others of rights "secured or protected" by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed.[32] There would, of course, have been no private violations to exempt if the only "right" granted by § 1

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[33] When Congressman Loan of Missouri asked the Chairman of the House Judiciary Committee, Mr. Wilson of Iowa, "why the committee limit the provisions of the second section to those who act under the color of law," Cong. Globe, 39th Cong., 1st Sess., 1120, he was obviously inquiring why the second section did not also punish those who violated the first *without* acting "under the color of law." Specifically, he asked:

"Why not let them [the penalties of § 2] apply to the whole community where the acts are committed?" *Ibid.*

Mr. Wilson's reply was particularly revealing. If, as floor manager of the bill, he had viewed acts not under color of law as not violative of § 1 at all, that would of course have been the short answer to the Congressman's query. Instead, Mr. Wilson found it necessary to explain that the Judiciary Committee did not want to make "a general criminal code for the States." *Ibid.* Hence only those who discriminated "in reference to civil rights . . . under the color of . . . local laws" were made subject to the criminal sanctions of § 2. *Ibid.*

Congress might have thought it appropriate to confine criminal punishment to state officials, oath-bound to support the supreme federal law, while allowing only civil remedies—or perhaps only preventive relief—against private violators. Or Congress might have thought that States which did not authorize abridgment of the rights declared in § 1 would themselves punish all who interfered with those rights without official authority. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 1758, 1785. Cf. *Civil Rights Cases*, 109 U. S. 3, 19, 24–25.

Whatever the reason, it was repeatedly stressed that the only violations "reached *and punished*" by the bill, see *id.*, at 1294 (emphasis added), would be those "done under color of State authority." *Ibid.* It is observed in dissent, *post*, at 10, that Senator Trumbull told Senator Cowan that § 2 was directed not at "State officers especially, but [at] everybody who violates the law." That remark, however, was nothing more than a reply to Senator Cowan's charge that § 2 was "exceedingly objectionable" in singling out state judicial officers for punishment for the first time "in the history of civilized legislation." *Id.*, at 500.

had been a right to be free of discrimination by public officials. Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" were to be criminally punishable under § 2.

In attempting to demonstrate the contrary, the respondents rely heavily upon the fact that the Congress which approved the 1866 statute wished to eradicate the recently enacted Black Codes—laws which had saddled Negroes with "onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value . . . ." *Slaughter-House Cases*, 16 Wall. 36, 70.[34] The respondents suggest that the only evil Congress sought to eliminate was that of racially discriminatory laws in the former Confederate States. But the Civil Rights Act was drafted to apply throughout the country,[35] and its language was far

[34] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., at 39, 474, 516–517, 602-603, 1123-1125, 1151-1153, 1160. For the substance of the codes and their operation, see H. Exec. Doc. No. 118, 39th Cong., 1st Sess.; S. Exec. Doc. No. 6, 39th Cong., 2d Sess.; 1 W. Fleming, Documentary History of Reconstruction 273–312 (1906); E. McPherson, The Political History of the United States During the Period of Reconstruction 29–44 (1871); 2 S. Morison and H. Commager, The Growth of the American Republic 17–18 (1950 ed.); K. Stampp, The Era of Reconstruction 79–81 (1965).

[35] See n. 31, *supra*. It is true, as the dissent emphasizes, *post*, at 11, that Senator Trumbull remarked at one point that the Act "could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union," whose laws did not themselves discriminate against Negroes. Cong. Globe, 39th Cong., 1st Sess., 1761. But the Senator was simply observing that the Act would "in no manner [interfere] with the . . . regulations of any State which protects all alike in their rights of person and property." *Ibid.* See also *id.*, at 476, 505, 600. That is, the Act would have

broader than would have been necessary to strike down discriminatory statutes.

That broad language, we are asked to believe, was a mere slip of the legislative pen. We disagree. For the same Congress that wanted to do away with the Black Codes *also* had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation. "Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced" to show that "private outrage and atrocity" was "daily inflicted on freedmen . . . ." [36] The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers,[37] white planters who agreed among themselves not to hire freed slaves without the permission of their former masters,[38] white

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no effect upon nondiscriminatory legislation. Senator Trumbull obviously could *not* have meant that the law would apply to racial discrimination in some States but not in others, for the bill on its face applied upon its enactment "in every State and Territory in the United States," and no one disagreed when Congressman Bingham complained that, unlike Congress' recently vetoed attempt to expand the Freedmen's Bureau, see n. 30, *supra*, the Civil Rights Act would operate "in every State in the Union." *Id.*, at 1292. Nor, contrary to a suggestion made in dissent, *post*, at 12, was the Congressman speaking only of the Act's *potential* operation in any State that might enact a racially discriminatory law in the *future*. The Civil Rights Act, Congressman Bingham insisted, would "be enforced in every State . . . [at] the *present* . . . time." *Ibid.* (Emphasis added.)

[36] J. tenBroek, *supra*, n. 30, at 181. See also W. Brock, An American Crisis 124 (1963); J. McPherson, The Struggle For Equality 332 (1964); K. Stampp, *supra*, n. 34, at 75, 131–132.

[37] Cong. Globe, 39th Cong., 1st Sess., 95, 1833.

[38] *Id.*, at 1160.

citizens who assaulted Negroes [39] or who combined to drive them out of their communities.[40]

Indeed, one of the most comprehensive studies then before Congress stressed the prevalence of private hostility toward Negroes and the need to protect them from the resulting persecution and discrimination.[41] The report noted the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns,[42] but described such laws as "mere isolated cases," representing "the local outcroppings of a spirit . . . found to prevail everywhere" [43]—a spirit expressed, for example,

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[39] *Id.*, at 339-340, 1160, 1835. It is true, as the dissent notes, *post*, at 13, that some of the references to private assaults occurred during debate on the Freedmen's Bureau bill, n. 30, *supra*, but the congressional discussion proceeded upon the understanding that all discriminatory conduct reached by the Freedmen's Bureau bill would be reached as well by the Civil Rights Act. See, *e. g.*, n. 31, *supra*.

[40] *Id.*, at 1835. It is clear that these instances of private mistreatment, see also text accompanying n. 41, *infra*, were understood as illustrative of the evils that the Civil Rights Act of 1866 would correct. Congressman Eldridge of Wisconsin, for example, said this: "Gentlemen refer us to individual cases of wrong perpetrated upon the freedmen of the South as an argument why we should extend the Federal authority into the different States to control the action of the citizens thereof. But, I ask, has not the South submitted to the altered state of things there, to the late amendment of the Constitution, to the loss of their slave property, with a cheerfulness and grace that we did not expect? . . . I deprecate all these measures because of the implication they carry upon their face that the people who have heretofore owned slaves intend to do them wrong. I do not believe it. . . . The cases of ill-treatment are exceptional cases." *Id.*, at 1156.

So it was that "opponents denied or minimized the facts asserted" but "did not contend that the [Civil Rights Act] would not reach such facts if they did exist." J. tenBroek, *supra*, n. 30, at 181.

[41] Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 2, 17–25. See W. Brock, *supra*, n. 36, at 40–42; K. Stampp, *supra*, n. 34, at 73–75.

[42] *Id.*, at 23–24.

[43] *Id.*, at 25.

by lawless acts of brutality directed against Negroes who traveled to areas where they were not wanted.[44] The report concluded that, even if anti-Negro legislation were "repealed in all the States lately in rebellion," equal treatment for the Negro would not yet be secured.[45]

In this setting, it would have been strange indeed if Congress had viewed its task as encompassing merely the nullification of racist laws in the former rebel States. That the Congress which assembled in the Nation's capital in December 1865 in fact had a broader vision of the task before it became clear early in the session, when three proposals to invalidate discriminatory state statutes were rejected as "too narrowly conceived."[46] From the outset it seemed clear, at least to Senator Trumbull of Illinois, Chairman of the Judiciary Committee, that stronger legislation might prove necessary. After Senator Wilson of Massachusetts had introduced his bill to strike down all racially discriminatory laws in the South,[47] Senator Trumbull said this:

> "I reported from the Judiciary Committee the second section of the [Thirteenth Amendment] for the very purpose of conferring upon Congress authority to see that the first section was carried out

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[44] *Id.*, at 18.

[45] *Id.*, at 35.

[46] J. tenBroek, *supra*, n. 30, at 177. One of the proposals, sponsored by Senator Wilson of Massachusetts, would have declared void all "laws, statutes, acts, ordinances, rules, and regulations" establishing or maintaining in former rebel States "any inequality of civil rights and immunities" on account of "color, race, or . . . a previous condition . . . of slavery." Cong. Globe, 39th Cong., 1st Sess., 39. The other two proposals, sponsored by Senator Sumner of Massachusetts, would have struck down in the former Confederate States "all laws . . . establishing any oligarchial privileges and any distinction of rights on account of color or race" and would have required that all persons there be "recognized as equal before the law." *Id.*, at 91.

[47] See n. 46, *supra*.

in good faith . . . and I hold that under that second section Congress will have the authority, when the constitutional amendment is adopted, *not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights.* . . . And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, *to buy and sell when they please,* to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.* . . . [So] when the constitutional amendment is adopted I trust we may pass a bill, if the action of the people in the southern States should make it necessary, that will be *much more sweeping and efficient than the bill under consideration.*" [48]

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[48] Cong. Globe, 39th Cong., 1st Sess., 43. (Emphasis added.) The dissent seeks to neutralize the impact of this quotation by noting that, prior to making the above statement, the Senator had argued that the second clause of the Thirteenth Amendment was inserted "for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." See *post,* at 7, 14. In fact, Senator Trumbull was simply replying at that point to the contention of Senator Saulsbury of Delaware that the second clause of the Thirteenth Amendment was never intended to authorize federal legislation interfering with subjects other than slavery itself. See *id.,* at 42. Senator Trumbull responded that the clause was intended to authorize *precisely* such legislation. That, "and none other," he said for emphasis, was its avowed purpose. But Senator Trumbull did *not* imply that the force of § 2 of the Thirteenth Amendment would be

Five days later, on December 18, 1865, the Secretary of State officially certified the ratification of the Thirteenth Amendment. The next day Senator Trumbull again rose to speak. He had decided, he said, that the "more sweeping and efficient" bill of which he had spoken previously ought to be enacted

> ". . . at an early day for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation *or a prevailing public sentiment* in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom . . . ."[49]

On January 5, 1866, Senator Trumbull introduced the bill he had in mind—the bill which later became the Civil Rights Act of 1866.[50] He described its objectives in terms that belie any attempt to read it narrowly:

> "Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be

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spent once Congress had nullified discriminatory state laws. On the contrary, he emphasized the fact that it was "for Congress to determine, and nobody else," what sort of legislation might be "appropriate" to make the Thirteenth Amendment effective. *Id.*, at 43. Cf. Part V of this opinion, *infra*.

[49] *Id.*, at 77. (Emphasis added.)

[50] *Id.*, at 129.

> affected by them have some means of availing themselves of their benefits." [51]

Of course, Senator Trumbull's bill would, as he pointed out, "destroy all [the] discriminations" embodied in the Black Codes,[52] but it would do more: It would affirmatively secure for all men, whatever their race or color, what the Senator called the "great fundamental rights":

> ". . . the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." [53]

As to those basic civil rights, the Senator said, the bill would "break down *all* discrimination between black men and white men." [54]

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[51] *Id.*, at 474.

[52] *Ibid.* See the dissenting opinion, *post*, at 9.

[53] *Id.*, at 475.

[54] *Id.*, at 599. (Emphasis added.) Senator Trumbull later observed that his bill would add nothing to federal authority if the States would fully "perform their constitutional obligations." *Id.*, at 600. See also Senator Trumbull's remarks, *id.*, at 1758; the remarks of Senator Lane of Indiana, *id.*, at 602–603; and the remarks of Congressman Wilson of Iowa, *id.*, at 1117–1118. But it would be a serious mistake to infer from such statements any notion (see the dissenting opinion, *post*, at 11–12) that, so long as the States refrained from actively discriminating against Negroes, their "obligations" in this area, as Senator Trumbull and others understood them, would have been fulfilled. For the Senator's concern, it will be recalled (see text accompanying n. 49, *supra*), was that Negroes might be "oppressed and in fact deprived of their freedom" not only by hostile laws but also by "prevailing public sentiment," and he viewed his bill as necessary "unless by local legislation they [the States] provide for the real freedom of their former slaves." *Id.*, at 77. See also *id.*, at 43. And see the remarks of Congressman Lawrence of Ohio:

"Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by

That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends [55] and as its great danger by its enemies [56] but was disputed by none. Opponents of the bill charged that it would not only regulate state laws but would directly "determine the persons who [would] enjoy . . . property within the States," [57] threatening the ability of white citizens "to determine who [would] be members of [their] communit[ies] . . . ." [58] The bill's advocates did not deny the accuracy of those characterizations. Instead, they defended the propriety of employing federal authority to deal with "the white man . . . . [who] would invoke the power of local prejudice" against the Negro.[59] Thus, when the Senate passed the Civil Rights Act on February 2, 1866,[60] it did so fully aware of the breadth of the measure it had approved.

In the House, as in the Senate, much was said about eliminating the infamous Black Codes.[61] But, like the Senate, the House was moved by a larger objective—that of giving real content to the freedom guaranteed by the Thirteenth Amendment. Representative Thayer of Pennsylvania put it this way:

> "[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offer-

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prohibitory laws, or by a failure to protect any one of them." *Id.*, at 1833.

[55] See, *e. g.*, the remarks of Senator Howard of Michigan. *Id.*, at 504.

[56] See, *e. g.*, the remarks of Senator Cowan of Pennsylvania, *id.*, at 500, and the remarks of Senator Hendricks of Indiana. *Id.*, at 601.

[57] Senator Saulsbury of Delaware. *Id.*, at 478.

[58] Senator Van Winkle of West Virginia. *Id.*, at 498.

[59] Senator Lane of Indiana. *Id.*, at 603.

[60] *Id.*, at 606–607.

[61] See, *e. g.*, *id.*, *at* 1118–1119, 1123–1125, 1151–1153, 1160. See generally the discussion in the dissenting opinion, *post*, at 16–18.

> ing . . . a mere paper guarantee. And when I voted for the second section of the amendment, I felt . . . certain that I had . . . given to Congress ability to protect . . . the rights which the first section gave . . . .
>
> "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. . . . The events of the last four years . . . have changed [a] large class of people . . . from a condition of slavery to that of freedom. *The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty* given to them by the American people." [62]

Representative Cook of Illinois thought that, without appropriate federal legislation, any "combination of men in [a] neighborhood [could] prevent [a Negro] from having any chance" to enjoy those benefits.[63] To Congressman Cook and others like him, it seemed evident that, with respect to basic civil rights—including the "right to . . . purchase, lease, sell, hold, and convey . . . property," Congress must provide that "there . . . be *no* discrimination" on grounds of race or color.[64]

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[62] *Id.*, at 1151. (Emphasis added.)

[63] *Id.*, at 1124.

[64] *Ibid.* (Emphasis added.) The clear import of these remarks is in no way diminished by the heated debate, see *id.*, at 1290–1294, portions of which are quoted in the dissenting opinion, *post*, at 18–19, between Representative Bingham, opposing the bill, and Representative Shellabarger, supporting it, over the question of what *kinds* of state laws might be invalidated by § 1, a question not involved in this case.

It thus appears that, when the House passed the Civil Rights Act on March 13, 1866,[65] it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act.

President Andrew Johnson vetoed the Act on March 27,[66] and in the brief congressional debate that followed, his supporters characterized its reach in all-embracing terms. One stressed the fact that § 1 would confer "the right . . . to purchase . . . real estate . . . without any qualification and without any restriction whatever . . . ." [67] Another predicted, as a corollary, that the Act would preclude preferential treatment for white persons in the rental of hotel rooms and in the sale of church pews.[68] Those observations elicited no reply. On April 6 the Senate, and on April 9 the House, overrode the President's veto by the requisite majorities,[69] and the Civil Rights Act of 1866 became law.[70]

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[65] *Id.*, at 1367. On March 15, the Senate concurred in the several technical amendments that had been made by the House. *Id.*, at 1413–1416.

[66] *Id.*, at 1679–1681.

[67] Senator Cowan of Pennsylvania. *Id.*, at 1781.

[68] Senator Davis of Kentucky. *Id.*, Appendix, at 183. Such expansive views of the Act's reach found frequent and unchallenged expression in the Nation's press. See, *e. g.*, Daily National Intelligencer (Washington, D. C.), March 24, 1866, p. 2, col. 1; New York Herald, March 29, 1866, p. 4, col. 3; Cincinnati Commercial, March 30, 1866, p. 4, col. 2; Evening Post (New York), April 7, 1866, p. 2, col. 1; Indianapolis Daily Herald, April 17, 1866, p. 2, col. 1.

[69] Cong. Globe, 39th Cong., 1st Sess., 1809, 1861.

[70] "Never before had Congress over-ridden a President on a major political issue, and there was special gratification in feeling that this had not been done to carry some matter of material interest, such as a tariff, but in the cause of disinterested justice." W. Brock, *supra*, n. 36, at 115.

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.

Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment.[71] It is quite true that some members of Congress supported the Fourteenth Amendment "in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *Hurd* v. *Hodge*, 334 U. S. 24, 32–33. But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible. For by that time most, if not all, of the former Confederate States, then under the control of "reconstructed" legislatures, had formally repudiated racial discrimination, and the focus of congressional concern had clearly shifted from hostile statutes to the activities of groups like the Ku Klux Klan, operating wholly outside the law.[72]

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[71] Section 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144:

"*And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted . . . ."

[72] See *United States* v. *Mosley*, 238 U. S. 383, 387–388; *United States* v. *Price*, 383 U. S. 787, 804–805; 2 W. Fleming, Documentary History of Reconstruction 285–288 (1907); K. Stampp, *supra*, n. 34, at 145, 171, 185, 198–204; G. Stephenson, Race Distinctions in American Law 116 (1910).

Against this background, it would obviously make no sense to assume, without any historical support whatever, that Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866.[73] "The cardinal rule is that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503. All Congress said in 1870 was that the 1866 law "is hereby re-enacted." That is all Congress meant.

As we said in a somewhat different setting two Terms ago, "We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language." *United States* v. *Price*, 383 U. S. 787, 801. "We are not at liberty to seek ingenious analytical instruments," *ibid.*, to carve from § 1982 an exception for private conduct—even though its application to such conduct in the present context is without established precedent. And, as the Attorney General of the United States said at the oral argument of this case, "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today."

V.

The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment, for it was pursuant

[73] The Court of Appeals in this case seems to have derived such an assumption from language in *Virginia* v. *Rives*, 100 U. S. 313, 317–318, and *Hurd* v. *Hodge*, 334 U. S. 24, 31. See 379 F. 2d 33, 39–40, 43. Both of those opinions simply asserted that, at least after its re-enactment in 1870, the Civil Rights Act of 1866 was directed only at governmental action. Neither opinion explained why that was thought to be so, and in each case the statement was merely dictum. See n. 25, *supra*.

to that constitutional provision that Congress originally enacted what is now § 1982. The Amendment consists of two parts. Section 1 states:

> "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Section 2 provides:

> "Congress shall have power to enforce this article by appropriate legislation."

As its text reveals, the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U. S. 3, 20. It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," *ibid.*, includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." *Id.*, at 23.[74]

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of

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[74] So it was, for example, that this Court unanimously upheld the power of Congress under the Thirteenth Amendment to make it a crime for one individual to compel another to work in order to discharge a debt. *Clyatt* v. *United States*, 197 U. S. 207.

Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U. S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*" *Ibid.* (Emphasis added.)

Those who opposed passage of the Civil Rights Act of 1866 argued in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master.[75] Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State.[76] And the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act. Their chief spokesman, Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth

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[75] See, *e. g.*, *Cong. Globe*, 39th Cong., 1st Sess., 113, 318, 476, 499, 507, 576, 600–601.

[76] See, *e. g.*, Cong. Globe, 38th Cong., 1st Sess., 1366, 2616, 2940–2941, 2962, 2986; Cong. Globe, 38th Cong., 2d Sess., 178–180, 182, 192, 195, 239, 241–242, 480–481, 529.

Amendment to the floor of the Senate in 1864. In defending the constitutionality of the 1866 Act, he argued that, if the narrower construction of the Enabling Clause were correct, then

> "the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself. . . . I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end." [77]

Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to

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[77] Cong. Globe, 39th Cong., 1st Sess., 322. See also the remarks of Senator Howard of Michigan. *Id.*, at 503.

inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*, 109 U. S. 3, 22.[78] Just as the Black Codes, enacted after the Civil

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[78] The Court did conclude in the *Civil Rights Cases* that "the act of . . . the owner of the inn, the public conveyance or place of amusement, refusing . . . accommodation" cannot be "justly regarded as imposing any badge of slavery or servitude upon the applicant." 109 U. S., at 24. "It would be running the slavery argument into the ground," the Court thought, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business." *Id.*, at 24–25. Mr. Justice Harlan dissented, expressing the view that "such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment." *Id.*, at 43.

Whatever the present validity of the position taken by the majority on that issue—a question rendered largely academic by Title II of the Civil Rights Act of 1964, 78 Stat. 241, 243 (see *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241; *Katzenbach* v. *McClung*, 379 U. S. 294)—we note that the entire Court agreed upon at least one proposition: The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 109 U. S., at 22. Cf. *id.*, at 35.

In *Hodges* v. *United States*, 203 U. S. 1, a group of white men had terrorized several Negroes to prevent them from working in a sawmill. The terrorizers were convicted under 18 U. S. C. § 241 (then Revised Statutes § 5508) of conspiring to prevent the Negroes from exercising the right to contract for employment, a right secured by 42 U. S. C. § 1981 (then Revised Statutes § 1977, derived from § 1 of the Civil Rights Act of 1866, see n. 28, *supra*). Section 1981 provides, in terms that closely parallel those of § 1982 (then Revised Statutes § 1978), that all persons in the United States "shall have *the same right . . . to make and enforce contracts*, to sue, be parties,

War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to

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give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." (Emphasis added.)

This Court reversed the conviction. The majority recognized that "one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts." 203 U. S., at 17. And there was no doubt that the defendants had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract. Yet the majority said that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery," *id.*, at 18, and asserted that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment. Contra, *United States* v. *Cruikshank*, 25 Fed. Cas. 707, 712 (dictum of Mr. Justice Bradley, on circuit), aff'd, 92 U. S. 542; *United States* v. *Morris*, 125 F. 322, 324, 330–331. Mr. Justice Harlan, joined by Mr. Justice Day, dissented. In their view, the interpretation the majority placed upon the Thirteenth Amendment was "entirely too narrow and . . . hostile to the freedom established by the supreme law of the land." 203 U. S., at 37. That interpretation went far, they thought, "towards neutralizing many declarations made as to the object of the recent Amendments to the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom." *Ibid.*

The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled.

"go and come at pleasure" [79] and to "buy and sell when they please" [80]—would be left with "a mere paper guarantee" [81] if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

Representative Wilson of Iowa was the floor manager in the House for the Civil Rights Act of 1866. In urging that Congress had ample authority to pass the pending bill, he recalled the celebrated words of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." [82]

"The end is legitimate," the Congressman said, "because it is defined by the Constitution itself. The end is the maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality." [83]

We agree. The judgment is

Reversed.

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[79] See text accompanying n. 48, *supra*.

[80] *Ibid.*

[81] See text accompanying n. 62, *supra*.

[82] Cong. Globe, 39th Cong., 1st Sess., 1118.

[83] *Ibid.*

SUPREME COURT OF THE UNITED STATES

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, v. Alfred H. Mayer Co. et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Douglas, concurring.

The Act of April 9, 1866, 14 Stat. 27, 42 U. S .C. § 1982, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Act was passed to enforce the Thirteenth Amendment which in § 1 abolished "slavery" and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" and in § 2 gave Congress power "to enforce this article by appropriate legislation."

Enabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery.

> "Slaves were not considered men. . . . They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will." Dubois, Black Reconstruction in America 10 (1935).[1]

[1] The cases are collected in five volumes in Catterall, Judicial Cases Concerning American Slavery and the Negro (1937). And see Cobb, Law of Negro Slavery, c. XIV (1858); Ostrander, The Rights of Man in America 1606–1861, p. 252 (1960); Stroud, Slavery 45–50 (1827); Wheeler, Law of Slavery 190–191 (1837).

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane* v. *Wilson,* 307 U. S. 268. Negroes have been excluded over and again from juries solely on account of their race, *e. g., Strauder* v. *West Virginia,* 100 U. S. 303, or have been forced to sit in segregated seats in court rooms, *Johnson* v. *Virginia,* 373 U. S. 61. They have been made to attend segregated and inferior schools, *e. g., Brown* v. *Board of Education,* 347 U. S. 483, or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; *Sweatt* v. *Painter,* 339 U. S. 629. Negroes have been prosecuted for marrying whites, *e. g., Loving* v. *Virginia,* 388 U. S. 1. They have been forced to live in segregated residential districts, *Buchanan* v. *Warley,* 245 U. S. 60, and residents of white neighborhoods have denied them entrance, *e. g., Shelley* v. *Kraemer,* 334 U. S. 1. Negroes have been forced to use segregated facilities in going about their daily lives, being excluded from railway coaches, *Plessy* v. *Ferguson,* 163 U. S. 537; public parks, *New Orleans* v. *Detiege,* 358 U. S. 54; restaurants, *Lombard* v. *Louisiana,* 373 U. S. 267; public beaches, *Mayor of Baltimore* v. *Dawson,*

350 U. S. 877; municipal golf courses, *Holmes* v. *City of Atlanta*, 350 U. S. 879; amusement parks, *Griffin* v. *Maryland*, 378 U. S. 130; busses, *Gayle* v. *Browder*, 352 U. S. 903; public libraries, *Brown* v. *Louisiana*, 383 U. S. 131. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton* v. *Alabama*, 376 U. S. 650.

That brief sampling of discriminatory practices, many of which continue today, stands almost as an annotation to what Frederick Douglass (1817–1895) wrote a century earlier:

> "Of all the races and varieties of men which have suffered from this feeling, the colored people of this country have endured most. They can resort to no disguises which will enable them to escape its deadly aim. They carry in front the evidence which marks them for persecution. They stand at the extreme point of difference from the Caucasian race, and their African origin can be instantly recognized, though they may be several removes from the typical African race. They may remonstrate like Shylock—'Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same summer and winter, as a Christian is?'—but such eloquence is unavailing. They are Negroes—and that is enough, in the eye of this unreasoning prejudice, to justify indignity and violence. In nearly every department of American life they are confronted by this insidious influence. It fills the air. It meets them at the workshop and factory, when they apply for work. It meets them at the church, at the hotel, at the

> ballot-box, and worst of all, it meets them in the jury-box. Without crime or offense against law or gospel, the colored man is the Jean Valjean of American society. He has escaped from the galleys; and hence all presumptions are against him. The workshop denies him work, and the inn denies him shelter; the ballot-box a fair vote, and the jury-box a fair trial. He has ceased to be the slave of an individual, but has in some sense become the slave of society. He may not now be bought and sold like a beast in the market, but he is the trammeled victim of a prejudice, well calculated to repress his manly ambition, paralyze his energies, and make him a dejected and spiritless man, if not a sullen enemy to society, fit to prey upon life and property and to make trouble generally." [2]

Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong.

A member of his race, duly elected by the people to a state legislature, is barred from that assembly because of his views on the Vietnam war. *Bond* v. *Floyd*, 385 U. S. 116.

Real estate agents use artifice to avoid selling "white property" to the blacks.[3] The blacks who travel the country, though entitled by law to the facilities for sleeping and dining that are offered all tourists, *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241; may well learn that the "vacancy" sign does not mean what it says, especially if the motel has a swimming pool.

On entering a half-empty restaurant they may find "reserved" signs on all unoccupied tables.

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[2] Excerpt from Frederick Douglass, The Color Line, The North American Review, June 1881, IV The Life and Writings of Frederick Douglass 343–344 (1955).

[3] See *Kanter* v. *Secretary of State* (N. Y. Ct. App. May —, 1968), in N. Y. Times, May 19, 1968, at 31, col. 1.

The black is often barred from a labor union because of his race.[4]

He learns that the order directing admission of his children into white schools has not been obeyed "with all deliberate speed," *Brown* v. *Board of Education*, 349 U. S. 294, 301, but has been delayed by numerous strategies and devices.[5] State laws, at times, have even encour-

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[4] See, *e. g.*, O'Hanlon, The Case Against the Unions, Fortune, Jan. 1968, at 170.

[5] The contrivances which some States have concocted to thwart the command of our decision in *Brown* v. *Board of Education* are by now legendary. See, *e. g.*, *Monroe* v. *Board of Commissioners*, — U. S. — (Tennessee "free transfer" plan); *Green* v. *County School Board*, — U. S. — (Virginia school board "freedom-of-choice" plan); *Raney* v. *Board of Education*, — U. S. — (Arkansas "freedom-of-choice" plan); *Bradley* v. *School Board*, 382 U. S. 103 (allocation of faculty allegedly on a racial basis); *Griffin* v. *County School Board*, 377 U. S. 218 (closing of public schools in Prince Edward County, Virginia, with tuition grants and tax concessions used to assist white children attending private segregated schools); *Goss* v. *Board of Education*, 373 U. S. 683 (Tennessee rezoning of school districts, with a transfer plan permitting transfer by students on the basis of race); *United States* v. *Jefferson County Board of Education et al.*, 372 F. 2d 836, aff'd *en banc*, 380 F. 2d 385 (C. A. 5th Cir. 1967) ("freedom-of-choice" plans in States within the jurisdiction of the United States Court of Appeals for the Fifth Circuit); *Northcross* v. *Board of Education*, 302 F. 2d 818 (C. A. 6th Cir. 1962) (Tennessee pupil assignment law); *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (C. A. 5th Cir. 1957) (Louisiana pupil assignment law); *Hall* v. *School Board*, 197 F. Supp. 649 (D. C. E. D. La. 1961), aff'd, 368 U. S. 515 (Louisiana law permitting closing of public schools, with extensive state aid going to private segregated schools); *Holmes* v. *Danner*, 191 F. Supp. 394 (D. C. M. D. Ga. 1961) (Georgia statute cutting off state funds if Negroes admitted to state university); *Aaron* v. *McKinley*, 173 F. Supp. 944 (D. C. E. D. Ark. 1959), aff'd, 361 U. S. 197 (Arkansas statute cutting off state funds to integrated school districts); *James* v. *Almond*, 170 F. Supp. 331 (D. C. E. D. Va. 1959) (closing of all integrated public schools). See also *Rogers* v. *Paul*, 382 U. S. 198; *Calhoun* v. *Latimer*, 377 U. S. 263; *Cooper* v. *Aaron*, 358 U. S. 1.

aged discrimination in housing. *Reitman* v. *Mulkey*, 387 U. S. 369.

This recital is enough to show how prejudices, once part and parcel of slavery, still persist. The men who sat in Congress in 1866 were trying to remove some of the badges or "customs" [6] of slavery when they enacted § 1982. And, as my Brother STEWART shows, the Congress that passed the so-called Open Housing Act in 1968 did not undercut any of the grounds on which § 1982 rests.

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[6] My Brother HARLAN's listing of some of the "customs" prevailing in the North at the time § 1982 was first enacted (*post*, at —) shows the extent of organized white discrimination against newly-freed blacks. As he states, "[r]esidential segregation was the prevailing pattern almost everywhere in the North." *Post*, at —. Certainly, then, it was "customary." To suggest, however, that there might be room for argument in this case (*post*, at —, n. 65) that the discrimination against petitioners was not in some measure a part and product of this longstanding and widespread customary pattern is to pervert the problem by allowing the legal mind to draw lines and make distinctions that have no place in the jurisprudence of a nation striving to rejoin the human race.

SUPREME COURT OF THE UNITED STATES

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, v. Alfred H. Mayer Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Harlan, whom Mr. Justice White joins, dissenting.

The decision in this case appears to me to be most ill-considered and ill-advised.

The petitioners argue that the respondent's racially motivated refusal to sell them a house entitles them to to judicial relief on two separate grounds. First, they claim that the respondent acted in violation of 42 U. S. C. § 1982; second, they assert that the respondent's conduct amounted in the circumstances to "state action" [1] and was therefore forbidden by the Fourteenth Amendment even in the absence of any statute. The Court, without reaching the second alleged ground, holds that the petitioners are entitled to relief under 42 U. S. C. § 1982, and that § 1982 is constitutional as legislation appropriate to enforce the Thirteenth Amendment.

For reasons which follow, I believe that the Court's construction of § 1982 as applying to purely private action is almost surely wrong, and at the least is open to serious doubt. The issue of the constitutionality of § 1982, as construed by the Court, and of liability under the Fourteenth Amendment alone, also present formidable difficulties. Moreover, the political processes of our

[1] This "state action" argument emphasizes the respondent's role as a housing developer who exercised continuing authority over a suburban housing complex with about 1,000 inhabitants.

own era have, since the date of oral argument in this case, given birth to a civil rights statute [2] embodying "fair housing" provisions [3] which would at the end of this year make available to others, though apparently not to the petitioners themselves,[4] the type of relief which the petitioners now seek. It seems to me that this latter factor so diminishes the public importance of this case that by far the wisest course would be for this Court to refrain from decision and to dismiss the writ as improvidently granted.

I.

I shall deal first with the Court's construction of § 1982, which lies at the heart of its opinion. That construction is that the statute applies to purely private as well as to state-authorized discrimination.

A.

The Court's opinion focuses upon the statute's legislative history, but it is worthy of note that the precedents in this Court are distinctly opposed to the Court's view of the statute.

In the *Civil Rights Cases*, 109 U. S. 3, decided less than two decades after the enactment of the Civil Rights Act of 1866, from which § 1982 is derived, the Court said in dictum of the 1866 Act:

> "This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. . . . The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that

[2] The Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73.

[3] *Id.*, §§ 801-819.

[4] See *ante*, at 5, n. 21.

> the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable in an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence." *Id.*, at 16–17.[5]

In *Corrigan* v. *Buckley*, 271 U. S. 323, the question was whether the courts of the District of Columbia might enjoin prospective breaches of racially restrictive covenants. The Court held that it was without jurisdiction to consider the petitioners' argument that the covenant was void because it contravened the Fifth, Thirteenth, and Fourteenth Amendments and their implementing statutes. The Court reasoned, *inter alia*, that the statutes, including the immediate predecessor to § 1982,[6] were inapplicable because

> "they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." 271 U. S., at 331.[7]

In *Hurd* v. *Hodge*, 334 U. S. 24, the issue was again whether the courts of the District might enforce racially restrictive covenants. At the outset of the process of reasoning by which it held that judicial enforcement of such a covenant would violate the predecessor to § 1982, the Court said:

> "We may start with the proposition that the statute does not invalidate private restrictive agree-

[5] See also *Virginia* v. *Rives*, 100 U. S. 313, 317–318.

[6] Section 1978 of the Revised Statutes.

[7] See also *Buchanan* v. *Warley*, 245 U. S. 60, 78–79.

ments so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is [*sic*] directed is governmental action. Such was the holding of *Corrigan* v. *Buckley* . . . ." 334 U. S., at 31.[8]

B.

Like the Court, I begin analysis of § 1982 by examining its language. In its present form, the section provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

The Court finds it "plain and unambiguous," *ante*, at 9, that this language forbids purely private as well as state-authorized discrimination. With all respect, I do not find it so. For me, there is an inherent ambiguity in the term "right," as used in § 1982. The "right" referred to may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an "absolute" right enforceable against private individuals. To me, the words of the statute, taken alone, suggest the former interpretation, not the latter.[9]

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[8] It seems to me that this passage is not dictum, as the Court terms it, *ante*, at 8 and n. 25, but a holding. For if the Court had held the covenants in question invalid as between the parties, then it would not have had to rely upon a finding of "state action."

[9] Despite the Court's view that this reading flies in the face of the "plain and unambiguous terms" of the statute, see *ante*, at 9, it is not without precedent. In the *Civil Rights Cases*, 109 U. S. 3, the Court said of identical language in the predecessor statute to § 1982:

"[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of indi-

Further, since intervening revisions have not been meant to alter substance, the intended meaning of § 1982 must be drawn from the words in which it was originally enacted. Section 1982 originally was a part of § 1 of the Civil Rights Act of 1866, 14 Stat. 27. Sections 1 and 2 of that Act provided in relevant part:

> "That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . , shall have the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.
>
> "Sec. 2 . . . . That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor. . . ."

It seems to me that this original wording indicates even more strongly than the present language that § 1 of the Act (as well as § 2, which is explicitly so limited) was

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viduals, unsupported by State authority . . . . The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true . . . . ; but if not sanctioned rights remain in full force, and may presumably be vindicated by in some way by the State, or not done under State authority, his resort to the laws of the State for redress. An individual cannot deprive a man of his right . . . to hold property, to buy and sell . . .; he may, by force or fraud, interfere with the enjoyment of the right in a particular case . . .; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right . . . ." 109 U. S., at 17.

intended to apply only to action taken pursuant to state or community authority, in the form of a "law, statute, ordinance, regulation, or custom." [10] And with deference I suggest that the language of § 2, taken alone, no more implies that § 2 "was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed," see *ante*, at 14, than it does that § 2 was carefully drafted to enforce all of the rights secured by § 1.

C.

The Court rests its opinion chiefly upon the legislative history of the Civil Rights Act of 1866. I shall endeavor to show that those debates do not, as the Court would have it, overwhelmingly support the result reached by the Court, and in fact that a contrary conclusion may equally well be drawn. I shall consider the legislative history largely in chronological sequence, dealing separately with the Senate and House debates.

The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment, and a few days before word was received of that Amendment's ratification. On December 13, Senator Wilson introduced a bill which would have invalidated all laws in the former rebel States which discriminated among persons as to civil rights on the basis of color, and which would have made it a misdemeanor to enact or enforce such a statute.[11] On the same day, Senator Trumbull said with regard to Senator Wilson's proposal:

"The bill does not go far enough, if what we have been told to-day in regard to the treatment of freed-

[10] The Court does not claim that the deletion from § 1 of the statute, in 1874, of the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding" was intended to have any substantive effect. See *ante*, at 11, n. 29.

[11] See Cong. Globe, 39th Cong., 1st Sess., 39–42.

> men in the southern States is true. . . . [U]ntil the [Thirteenth Amendment] is adopted, there may be some question . . . as to the authority of Congress to pass such a bill as this, but after the adoption of the constitutional amendment there can be none.
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> "The second clause of that amendment was inserted for some purpose, and I would like to know . . . for what purpose? Sir, for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." [12]

Senator Trumbull then indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmen's Bureau and to secure the freedmen in their civil rights, both bills in his view being authorized by the second clause of the Thirteenth Amendment.[13] Since he had just stated that the purpose of that clause was to enable Congress to nullify acts of the state legislatures, it seems inferable that this also was also to be the aim of the promised bills.

On January 5, Senator Trumbull introduced both the Freedmen's bill and the civil rights bill.[14] The Freedmen's bill would have strengthened greatly the existing system by which agents of the Freedmen's Bureau exercised protective supervision over freedmen wherever they were present in large numbers. *Inter alia*, the Freedmen's bill would have permitted the President, acting through the Bureau, to extend "military protection and jurisdiction" over all cases in which persons in the former rebel States were

> "in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice,

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[12] *Id.*, at 43.

[13] See *ibid.*

[14] See Cong. Globe, 39th Cong., 1st Sess., 129.

> [denied or refused] any of the civil rights or immunities belonging to white persons, including the right . . . to inherit, purchase, lease, sell, hold and convey real and personal property, . . . on account of race . . . ."[15]

The next section of the Freedmen's bill provided that the agents of the Freedmen's Bureau might try and convict of a misdemeanor any person who deprived another of such rights on account of race and "under color of any State or local law, ordinance, police, or other regulation, or custom . . . ." Thus, the Freedmen's bill, which was generally limited in its application to the Southern States and which was correspondingly more sweeping in its protection of the freedmen than the civil rights bill,[16] defined both the rights secured and the denials of those rights which were criminally punishable in terms of acts done under the aegis of a State or locality. The only significant distinction was that denials which occurred "in consequence of a State or local . . . prejudice" would have entitled the victim to military protection but would not have been criminal. In the corresponding section of the companion and generally parallel civil rights bill, which was to be effective throughout the Nation, the

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[15] Freedmen's bill, § 7. The text of the bill may be found in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 72 (1871). The Freedmen's bill was passed by both the Senate and the House, but the Senate failed to override the President's veto. See Cong. Globe, 39th Cong., 1st Sess., 421, 688, 742, 748, 775, 915–916, 943.

[16] Section 7 of the Freedmen's bill would have permitted the President to extend "military protection and jurisdiction" over all cases in which the specified rights were denied, while § 3 of the Civil Rights Act merely gave the federal courts concurrent jurisdiction over such actions. Section 8 of the Freedmen's bill would have allowed agents of the Freedmen's Bureau to try and convict those who violated the bill's criminal provisions, while § 3 of the Civil Rights Act only gave the federal courts exclusive jurisdiction over such actions.

reference to "prejudice" was omitted from the rights-defining section. This would seem to imply that the more widely applicable civil rights bill was meant to provide protection only against those discriminations which were legitimated by a state or community sanction sufficiently powerful to deserve the name "custom."

The form of the Freedmen's bill also undercuts the Court's argument, *ante,* at 13, that if § 1 of the Civil Rights Act were construed as extending only to "state action," then "much of § 2 [which clearly was so limited] would make no sense at all." For the similar structure of the companion Freedmen's bill, drafted by the same hand and largely parallel in structure, would seem to confirm that the limitation to "state action" was deliberate.

The civil rights bill was debated intermittently in the Senate from January 12, 1866, until its eventual passage over the President's veto on April 6. In the course of the debates, Senator Trumbull, who was by far the leading spokesman for the bill, made a number of statements which can be taken only to mean that the bill was aimed at "state action" alone. For example, on January 29, 1866, Senator Trumbull began by citing a number of recently enacted Southern laws depriving men of rights named in the bill. He stated that "[t]he purpose of the bill under consideration is to destroy *all these discriminations,* and carry into effect the constitutional amendment." [17] Later the same day, Senator Trumbull quoted § 2 of the bill in full, and said:

> "This is the valuable section of the bill so far as protecting the rights of freedmen is concerned. . . . When it comes to be understood in all parts of the United States that *any person* who shall deprive another of *any right* . . . in consequence of his color

[17] Cong. Globe, 39th Cong., 1st Sess., 474. (Emphasis added.)

> or race will expose himself to fine and imprisonment, I think such acts will soon cease." [18]

These words contain no hint that the "rights" protected by § 2 were intended to be any less broad than those secured by § 1. Of course, § 2 plainly extended only to "state action." That Senator Trumbull viewed §§ 1 and 2 as coextensive appears even more clearly from his answer the following day when asked by Senator Cowan whether there was "not a provision [in the bill] by which State officers are to be punished?" Senator Trumbull replied: "Not State officers especially, but *everybody who violates the law. It is the intention to punish everybody who violates the law.*" [19]

On January 29, Senator Trumbull also uttered the first of several remarkably similar and wholly unambiguous statements which indicated that the bill was aimed only at "state action." He said:

> "[This bill] may be assailed as drawing to the Federal Government powers that properly belong to 'States'; but I apprehend, rightly considered, it is not obnoxious to that objection. *It will have no operation in any State where the laws are equal, where all persons have the same civil rights without*

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[18] *Id.*, at 475. (Emphasis added.)

[19] *Id.*, at 500. (Emphasis added.) The *Civil Rights Cases*, 109 U. S. 3, suggest how Senator Trumbull might have expected § 2 to affect persons other than "officers" in spite of its "under color" language, for it was there said in dictum that:

"The Civil Rights Bill . . . is analogous . . . to [a law] under the original Constitution, declaring that the validity of contracts should not be impaired, and that if *any person* bound by a contract should refuse to comply with it, *under color or pretence that it had been rendered void or invalid by a State law*, he should be liable to an action upon it in the courts of the United States, *with the addition of a penalty for setting up such an unjust and unconstitutional defence.*" 109 U. S., at 17. (Emphasis added.)

> *regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.*[20]

Senator Trumbull several times reiterated this view. On February 2, replying to Senator Davis of Kentucky, he said:

> "Why, sir, *if the State of Kentucky makes no discrimination in civil rghts between its citizens, this bill has no operation whatever in the State of Kentucky.* Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing? The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations." [21]

On April 4, after the President's veto of the bill Senator Trumbull stated that "If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts . . . ." [22] Later the same day, he said:

> "This bill in no manner interferes with the municipal regulations of any State which protects all men alike in their rights of person and property. *It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.*[23]

The remarks just quoted constitute the plainest possible statement that the civil rights bill was intended to

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[20] Cong. Globe, 39th Cong., 1st Sess., 476. (Emphasis added.)

[21] *Id.*, at 600. (Emphasis added.)

[22] *Id.*, at 1758.

[23] *Id.*, at 1761. (Emphasis added.)

apply only to state-sanctioned conduct and not to purely private action. The Court has attempted to negate the force of these statements by citing other declarations by Senator Trumbull and others that the bill would operate everywhere in the country. See *ante*, at 15, n. 35. However, the obvious and natural way to reconcile these two sets of statements is to read the ones about the bill's nationwide application as declarations that the enactment of a racially discriminatory law in any State would bring the bill into effect there.[24] It seems to me that very great weight must be given these statements of Senator Trumbull, for they were clearly made to reassure Northern and Border State Senators about the extent of the bill's operation in their States.

On April 4, Senator Trumbull gave two additional indications that the bill was intended to reach only state-sanctioned action. The first occurred during Senator Trumbull's defense of the part of § 3 of the bill which gave federal courts jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts . . . of the State or locality where they may be any of the right secured to them by the first section of this act . . . ." Senator Trumbull said:

> "If it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth Amendment]."[25]

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[24] Moreover, a few Northern States apparently did have laws which denied to Negroes rights enumerated in the Act. See G. Stephenson, Race Distinctions in American Law 36–39 (1910); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860, at 93–94 (1961).

[25] Cong. Globe, 39th Cong., 1st Sess., 1759.

If the bill had been intended to reach purely private discrimination it seems very strange that Senator Trumbull did not think it necessary to defend the surely more dubious federal jurisdiction over cases involving no state action whatsoever. A few minutes later, Senator Trumbull reiterated that his reason for introducing the civil rights bill was to bring about "the passage of a law by Congress, securing equality in civil rights *when denied by State authorities* to freedmen and all other inhabitants of the United States . . . ." [26]

Thus, the Senate debates contain many explicit statements by the bill's own author, to whom the Senate naturally looked for an explanation of its terms, indicating that the bill would prohibit only state-sanctioned discrimination.

The Court puts forward in support of its construction an impressive number of quotations from and citations to the Senate debates. However, upon more circumspect analysis than the Court has chosen to give, virtually all of these appear to be either irrelevant or equally consistent with a "state action" interpretation. The Court's mention, *ante*, at 16, of a reference in the Senate debates to "white employers who refused to pay their Negro workers" surely does not militate against a "state action" construction, since "state action" would include conduct pursuant to "custom," and there was a very strong "custom" of refusing to pay slaves for work done. The Court's citation, *ante*, at 16–17, of Senate references to "white citizens who assaulted Negroes" is not in point, for the debate cited by the Court concerned the Freedmen's bill, not the civil rights bill.[27] The former by its terms forbade discrimination pursuant to "prejudice," as well as "custom," and in any event neither bill pro-

[26] *Id.*, at 1760.

[27] See Cong. Globe, 39th Cong., 1st Sess., 339–340.

vided a remedy for the victim of a racially motivated assault.[28]

The Court's quotation, *ante*, at 18–19, of Senator Trumbull's December 13 reference to the then-embryonic civil rights bill is also compatible with a "state action" interpretation, at least when it is recalled that the unedited quotation, see *supra*, at ——, includes a statement that the second clause of the Thirteenth Amendment, the authority for the proposed bill, was intended solely as a check on state legislatures. Senator Trumbull's declaration the following day that the forthcoming bill would be aimed at discrimination pursuant to "a prevailing public sentiment" as well as to legislation, see *ante*, at 20, is also consistent with a "state action" reading of the bill, for the bill explicitly prohibited actions done under color of "custom" as well as of formal laws.

The three additional statements of Senator Trumbull and the remarks of senatorial opponents of the bill, quoted by the Court, *ante*, at 20–22, to show the bill's sweeping scope, are entirely ambiguous as to whether the speakers thought the bill prohibited only state-sanctioned conduct or reached wholly private action as well. Indeed, if the bill's opponents thought that it would have the latter effect, it seems a little surprising that they did not object more strenuously and explicitly.[29] The remark of Senator Lane which is quoted by the Court, *ante*, at 22, to prove that he viewed the bill as reaching "'the white man . . . [who] would invoke the

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[28] The Court also gives prominence, see *ante*, at 17–18, to a report by General Carl Schurz which described private as well as official discrimination against freedmen in the South. However, it is apparent that the Senate regarded the report merely as background, and it figured relatively little in the debates. Moreover, to the extent that the described discrimination was the product of "custom," it would have been prohibited by the bill.

[29] See *infra*, at ——.

power of local prejudice' against the Negro," seems to have been quoted out of context. The quotation is taken from a part of Senator Lane's speech in which he defended the section of the bill permitting the President to invoke military authority when necessary to enforce the bill. After noting that there might be occasions "[w]here organized resistance to the legal authority assumes that shape that the officers cannot execute a writ," [30] Senator Lane concluded that "if [the white man] would invoke the power of local prejudice to override the laws of the country, this is no Government unless the military may be called in to enforce the order of the civil courts and obedience to the laws of the country." [31] It seems to me manifest that, taken in context, this remark is beside the point in this case.

The post-veto remarks of opponents of the bill, cited by the Court, *ante,* at 24, also are inconclusive. Once it is recognized that the word "right" as used in the bill is ambiguous, then Senator Cowan's statement, *ante,* at 24, that the bill would confer "the right . . . to purchase . . . real estate . . . without any qualification" [32] must inevitably share that ambiguity. The remarks of Senator Davis, *ante,* at 24, with respect to rental of hotel rooms and sale of church pews are, when viewed in context, even less helpful to the Court's thesis. For these comments were made immediately following Senator Davis' plaintive acknowledgment that "this measure proscribes all discriminations . . . that may be made . . . by any 'ordinance, regulation, or custom,' as well as by 'law or statute.'" [33] Senator Davis then observed that ordinances, regulations, and customs presently conferred upon white persons the most comfortable accommodations in ships

[30] Cong. Globe, 39th Cong., 1st Sess., 603.

[31] *Ibid.*

[32] See Cong. Globe, 39th Cong., 1st Sess., 1781.

[33] Cong. Globe, 39th Cong., 1st Sess., Appendix, 183.

and steamboats, hotels, churches, and railroad cars, and stated that "[t]his bill . . . declares all persons who enforce these distinctions to be criminals against the United States . . . ." [34] Thus, Senator Davis not only tied these obnoxious effects of the bill to its "customs" provision but alleged that they were brought about by § 2 as well as § 1. There is little wonder that his remarks "elicited no reply," see *ante*, at 24, from the bill's supporters.

The House debates are even fuller of statements indicating that the civil right bill was intended to reach only state-endorsed discrimination. Representative Wilson was the bill's sponsor in the House. On the very first day of House debate, March 1, Representative Wilson said in explaining the bill:

> "[I]f the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though citizens were of one race or color, our troubles as a nation would be well-nigh over. . . . It will be observed that *the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States* on 'account of race color, or previous condition of slavery.' " [35]

A few minutes later, Representative Wilson said:

> "Before our Constitution was formed, the great fundamental rights [which are embodied in this bill] belonged to every person who became a member of our great national family . . . . The entire machinery of government . . . was designed, among other things, to secure a more perfect enjoyment of these rights . . . . I assert that we possess the power to do those things which Governments are organized to do; *that we may protect a citizen of*

[34] *Ibid.*

[35] Cong. Globe, 39th Cong., 1st Sess., 1118.

> *the United States against a violation of his rights by the law of a single State;* . . . that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States . . . ." [36]

These statements surely imply that Representative Wilson believed the bill to be aimed at state-sanctioned discrimination and not at purely private discrimination, which of course existed unhindered "[b]efore our Constitution was formed."

Other congressmen expressed similar views. On March 2, Representative Thayer, one of the bill's supporters, said:

> "The events of the last four years . . . have changed [the freedmen] from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people.
>
> "Sir, *if it is competent for the new-formed Legislatures of the rebel States to enact laws* . . . which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; . . . then I demand to know, of what practical value is the amendment abolishing slavery . . . ?" [37]

A few minutes later, he said:

> "Do you give freedom to a man when you allow him to be deprived of [those] great natural rights to which every man is entitled by nature? . . . [W]hat kind of freedom is that by which the man placed in

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[36] *Id.*, at 1119.

[37] *Id.*, at 1151. (Emphasis added.)

> a state of freedom is subject to the tyranny of *laws* which deprive him of [those] rights . . . ?" [38]

A little later, Representative Thayer added:

> "[The freedmen] are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property, and no just reason exists why they should not enjoy the protection of that guarantee . . . .
>
> "What is the necessity which gives occasion for that protection? Sir, in at least six of the lately rebellious States *the reconstructed Legislatures of those States have enacted laws* which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedmen . . . ." [39]

An opponent of the bill, Representative Bingham, said on March 9:

> "[W]hat, then, is proposed by the provision of the first section? *Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color* in any of the civil rights of the citizen." [40]

Representative Shellabarger, a supporter of the bill, discussed it on the same day. He began by stating that he had no doubt of the constitutionality of § 2 of the bill, provided Congress might enact § 1. With respect to § 1, he said:

> "Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by state laws shall be for and upon all citizens alike . . . . Self-evidently, this is the whole effect of this first section. It secures . . . equality of protection in those

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[38] *Id.*, at 1152. (Emphasis added.)
[39] *Id.*, at 1153. (Emphasis added.)
[40] *Id.*, at 1291. (Emphasis added.)

> enumerated civil rights which the States may deem proper to confer upon any races . . . . It must . . . be noted that the violations of citizens' rights, which are reached and punished by this bill, are those which are inflicted under 'color of law,' &c. The bill does not reach mere private wrongs, but only those done under color of state authority . . . . [I]ts whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act. This is the whole of it." [41]

Thus, Representative Shellabarger said in so many words that the bill had no impact on "mere private wrongs."

After the President's veto of the bill, Representative Lawrence, a supporter, stated his views. He said:

> "The bill does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and inalienable rights pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws . . . .
>
> "Now, there are two ways in which a State may undertake to deprive citizens of these . . . rights: either by prohibiting laws, or by a failure to protect any one of them.
>
> "If the people of a State should become hostile to a large class of naturalized citizens *and should enact*

[41] *Id.*, at 1293–1294. It is quite clear that Representative Shellabarger was speaking of the bill's first section, for he did not mention the second section until later in his speech, and then only briefly and in terms which indicated that he thought it co-extensive with the first ("I cannot remark on the second section further than to say that it is the ordinary case of providing punishment for violating a law of Congress."). See *id.*, at 1294.

> *laws* to prohibit them and no other citizens . . . from inheriting, buying, holding, or selling property, . . . that would be prohibitory legislation. If the State *should simply enact laws* for native-born citizens *and provide no law* under which naturalized citizens could enjoy any of these rights, and should deny them protection by civil process or penal enactments, that would be a denial of justice."[42]

From this passage it would appear that Representative Lawrence conceived of the word "right" in § 1 of the bill as referring to a right to equal legal status, and that he believed that the sole effect of the bill was to prohibit state-imposed discrimination.

The Court quotes and cites a number of passages from the House debates in aid of its construction of the bill. As in the case of the Senate debates, most of these appear upon close examination to provide little support. The first significant citation, *ante*, at 14, n. 33, is a dialogue between Representative Wilson and Representative Loan, another of the bill's supporters.

The full exchange went as follows:

> "Mr. LOAN. Mr. Speaker, I . . . ask the chairman . . . why the committee limit the provisions of the second section to persons who act under the color of law. Why not let them apply to the whole community where the acts are committed?
>
> "Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.
>
> "Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizen?

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[42] Cong. Globe, 39th Cong., 1st Sess., 1832–1833. (Emphasis added.)

"Mr. WILSON, of Iowa. We are not making a general criminal code for the States.

"Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?

"Mr. WILSON, of Iowa. A law without a sanction is of very little force.

"Mr. LOAN. Then why not put it in the bill directly?

"Mr. WILSON, of Iowa. That is what we are trying to do." [43]

The interpretation which the Court places on Representative Wilson's remarks, see *ante,* at 14, n. 33, is a conceivable one.[44] However, it is equally likely that, since both participants in the dialogue professed concern solely with § 2 of the bill, their remarks carried no implication about the scope of § 1. Moreover, it is possible to read the entire exchange as concerned with discrimination in communities having discriminatory laws, with Representative Loan urging that the laws should be abrogated directly or that all persons, not merely officers, who discriminated pursuant to them should be criminally punishable.

The next significant reliance upon the House debates is the Court's mention of references in the debates "to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities."

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[43] *Id.*, at 1120.

[44] It is worthy of note, however, that if Representative Wilson believed that § 2 of the bill would apply only to state officers, and not to other members of the community, he apparently differed from the bill's author. See the remarks of Senator Trumbull quoted, *supra,* at —.

Ante, at 16–17. (Footnotes omitted.)[45] As was pointed out in the discussion of the Senate debates, *supra*, at —, the references to white men's refusals to pay freedmen and their agreements not to hire freedmen without their "masters' " consent are by no means contrary to a "state action" view of the civil rights bill, since the bill expressly forbade action pursuant to "custom" and both of these practices reflected "customs" from the time of slavery. The Court cites two different House references to assaults on Negroes by whites. The first was by Congressman Windom,[46] and close examination reveals that his only mention of assaults was with regard to a Texas "pass system," under which freedmen were whipped if found abroad without passes, and a South Carolina law permitting freedmen to be whipped for insolence.[47] Since these assaults were sanctioned by law, or at least by "custom," they would be reached by the bill even under a "state action" interpretation. The other allusion to assaults, as well as the mention of combinations of whites to drive freedmen from communities, occurred in a speech by Representative Lawrence.[48] These references were shortly preceded by the remarks of Congressman Lawrence quoted, *supra*, at —, and were immediately followed by his comment that *"If States should undertake to authorize such offenses, or deny to a class of citizens all protection against them,* we may then inquire whether

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[45] The Court's reliance, see *ante*, at 14, n. 33, on the statement of Representative Shellabarger that "the violations of citizens' rights which are reached and punished by this bill are those which are inflicted under 'color of law' . . . ," Cong. Globe, 39th Cong., 1st Sess., 1294, seems very misplaced when the statement is taken in context. A fuller version of Representative Shellabarger's remarks will be found, *supra*, at —.

[46] See Cong. Globe, 39th Cong., 1st Sess., 1160.

[47] See *ibid.*

[48] See Cong. Globe, 39th Cong., 1st Sess., 1835.

the nation itself may be destroyed . . . ." [49] These fore and aft remarks imply that Congressman Lawrence's concern was that the activities referred to would receive state sanction.

The Court, *ante,* at 17, n. 40, quotes a statement of Representative Eldridge, an opponent of the bill, in which he mentioned references by the bill's supporters to "individual cases of wrong perpetrated upon the freedmen of the South . . . ." [50] However, up to that time there had been no mention whatever in the House debates of any purely private discrimination,[51] so one can only conclude that by "individual cases" Representative Eldridge meant "isolated cases," not "cases of purely private discrimination."

The last significant reference [52] by the Court to the House debates is its statement, *ante,* at 23, that "Representative Cook of Illinois thought that, without appropriate federal legislation, any 'combination of men in [a] neighborhood [could] prevent [a Negro] from having a chance' to enjoy" the benefits of the Thirteenth Amendment. This quotation seems to be taken out of context. What Representative Cook said was:

> "[W]hen those rights which are enumerated in this bill are denied to any class of men on account of race or color, *when they are subjected to a system of vagrant laws* which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom. If a man can be sold, the man is a slave. If he is nominally freed

[49] *Ibid.* (Emphasis added.)

[50] Cong. Globe, 39th Cong., 1st Sess., 1156.

[51] See *id.,* at 1115–1124, 1151–1155.

[52] The emphasis given by the Court to the statement of Representative Thayer which is quoted *ante,* at 22–23, surely evaporates when the statement is viewed in conjunction with Representative Thayer's immediately following remarks, quoted, *supra,* at —.

> by the amendment to the Constitution, . . . he has simply the labor of his hands on which he can depend. Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. *They can pass a law* that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold." [53]

These remarks clearly were addressed to discriminations effectuated by law, or sanctioned by "custom." As such, they would have been reached by the bill even under a "state action" interpretation.

D.

The foregoing analysis of the language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable. Another, albeit less tangible, consideration points in the same direction. Many of the legislators who took part in the congressional debates inevitably must have shared the individualistic ethic of their time, which emphasized personal freedom [54] and embodied a distaste for governmental interference which was soon to culminate in the era of laissez-faire.[55] It

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[53] *Id.*, at 1124. (Emphasis added.) Earlier in the same speech, Representative Cook had described actual vagrancy laws which had recently been passed by reconstructed Southern legislatures. See *id.*, at 1123–1124.

[54] An eminent American historian has said that the events of the last third of the 19th century took place "in a framework of pioneer individualistic mores . . . ." S. E. Morison, The Oxford History of the American People 788 (1965). See also 3 V. Parrington, Main Currents in American Thought 7–22 (1930).

[55] It has been suggested that the effort of the congressional radicals to enact a program of land reform in favor of the freedmen during Reconstruction failed in part because it smacked too much

seems to me that most of these men would have regarded it as a great intrusion on individual liberty for the Government to take from a man the power to refuse for personal reasons to enter into a purely private transaction involving the disposition of property, albeit those personal reasons might reflect racial bias. It should be remembered that racial prejudice was not uncommon in 1866, even outside the South.[56] Although Massachusetts had recently enacted the Nation's first law prohibiting racial discrimination in public accommodations,[57] Negroes could not ride within Philadelphia streetcars [58] or attend public schools with white children in New York City.[59] Only five States accorded equal voting rights to Negroes,[60] and it appears that Negroes were allowed to serve on juries only in Massachusetts.[61] Residential

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of "paternalism" and interference with property rights. See K. Stampp, The Era of Reconstruction 126–131 (1965).

[56] See generally M. Konvitz & T. Leskes, A Century of Civil Rights (1961); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860 (1961); K. Stampp, *supra*, at 12–17; G. Stephenson, Race Distinctions in American Law (1910); Maslow & Robison, Civil Rights Legislation and the Fight for Equality, 1862–1952, 20 U. Chi. L. Rev. 363 (1953).

[57] See M. Konvitz & T. Leskes, *supra*, at 155–156; [1864–1865] Mass. Laws 650.

[58] Negroes were permitted to ride only on the front platforms of the cars. See L. Liwack, *supra*, at 112.

[59] Negro students in New York City were compelled to attend separate schools, called African schools, under authority of an 1864 New York State statute which empowered school officials to establish separate, equal schools for Negro children. See L. Litwack, *supra*, at 121, 133–134, 136, 151; G. Stephenson, *supra*, at 185; [1864] N. Y. Laws 1281. In 1883, the New York Court of Appeals held that students in Brooklyn might constitutionally be segregated pursuant to the statute. See *People ex rel. King* v. *Gallagher*, 93 N. Y. 438. In 1900, the statute was finally repealed and segregation legally forbidden. See [1900] N. Y. Laws, Vol. II, at 1173.

[60] See L. Litwack, *supra*, at 91–92. The States were Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont. See *id.*, at 91.

[61] See L. Litwack, *supra*, at 94.

segregation was the prevailing pattern almost everywhere in the North.[62] There were no state "fair housing" laws in 1866, and it appears that none had ever been proposed.[63] In this historical context, I cannot conceive that a bill thought to prohibit purely private discrimination not only in the sale or rental of housing but in *all* property transactions would not have received a great deal of criticism explicitly directed to this feature. The fact that the 1866 Act received *no* criticism of this kind[64] is for me strong additional evidence that it was not regarded as extending so far.

In sum, the most which can be said with assurance about the intended impact of the 1866 Civil Rights Act upon purely private discrimination is that the Act probably was envisioned by most members of Congress as prohibiting official, community-sanctioned discrimination in the South, engaged in pursuant to local "customs" which in the recent time of slavery probably were embodied in laws or regulations.[65] Acts done under the

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[62] See *id.*, at 168–170.

[63] It has been noted that:

"Residential housing, despite its importance . . . , appears to be the last of the major areas of discrimination that the states have been willing to attack." M. Konvitz & T. Leskes, *supra*, at 236.

And as recently as 1953, it could be said:

"Bills have been introduced in state legislatures to forbid racial or religious discrimination in 'multiple dwellings' (those housing three or more families), . . . but these proposals have not been considered seriously by any legislative body." Maslow & Robinson, *supra*, at 408. (Footnotes omitted.)

[64] In contrast, the bill was repeatedly and vehemently attacked, in the face of emphatic denials by its sponsors, on the ground that it allegedly would invalidate two types of *state laws:* those denying Negroes equal voting rights and those prohibiting intermarriage. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 598, 600, 604, 606, 1121, 1157, 1263.

[65] The petitioners do not argue, and the Court does not suggest, that the discrimination complained of in this case was the product of such a "custom."

color of such "customs" were, of course, said by the Court in the *Civil Rights Cases*, 109 U. S. 3, to constitute "state action" prohibited by the Fourteenth Amendment. See *id.*, at 16, 17, 21. Adoption of a "state action" construction of the Civil Rights Act would therefore have the additional merit of bringing its interpretation into line with that of the Fourteenth Amendment, which this Court has consistently held to reach only "state action." This seems especially desirable in light of the wide agreement that a major purpose of the Fourteenth Amendment, at least in the minds of its congressional proponents, was to assure that the rights conferred by the then recently enacted Civil Rights Act could not be taken away by a subsequent Congress.[66]

II.

The foregoing, I think, amply demonstrates that the Court has chosen to resolve this case by according to a loosely worded statute a meaning which is open to the strongest challenge in light of the statute's legislative history. In holding that the Thirteenth Amendment is sufficient constitutional authority for § 1982 as interpreted, the Court also decides a question of great importance. Even contemporary supporters of the aims of the 1866 Civil Rights Act doubted that those goals could constitutionally be achieved under the Thirteenth Amendment,[67] and this Court has twice expressed similar doubts. See *Hodges* v. *United States*, 203 U. S. 1, 16–18; *Corrigan* v. *Buckley*, 271 U. S. 323, 330. But cf. *Civil*

[66] See, *e. g.*, H. Flack, The Adoption of the Fourteenth Amendment 94 (1908); J. James, The Framing of the Fourteenth Amendment 126–128, 179 (1956); 2 S. E. Morison & H. Commager, The Growth of the American Republic 39 (4th ed. 1950); K. Stampp, *supra*, at 136; J. tenBroek, Equal Under Law 224 (1965); L. Warsoff, Equality and the Law 126 (1938).

[67] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 504–505 (Senator Johnson); *id.*, at 1291–1293 (Representative Bingham).

Rights Cases, 109 U. S. 3, 22. Thus, it is plain that the course of decision followed by the Court today entails the resolution of important and difficult issues.

The only apparent way of deciding this case without reaching those issues would be to hold that the petitioners are entitled to relief on the alternative ground advanced by them: that the respondent's conduct amounted to "state action" forbidden by the Fourteenth Amendment. However, that route is not without formidable obstacles of its own, for the opinion of the Court of Appeals makes it clear that this case differs substantially from any "state action" case previously decided by this Court. See 379 F. 2d, at 40–45.

The fact that a case is "hard" does not, of course, relieve a judge of his duty to decide it. Since the Court did vote to hear this case, I normally would consider myself obligated to decide whether the petitioners are entitled to relief on either of the grounds on which they rely. After mature reflection, however, I have concluded that this is one of those rare instances in which an event which occurs after the hearing of argument so diminishes a case's public significance, when viewed in light of the difficulty of the questions presented, as to justify this Court in dismissing the writ as improvidently granted.

The occurrence to which I refer is the recent enactment of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73. Title VIII of that Act contains comprehensive "fair housing" provisions, which by the terms of § 803 will become applicable on January 1, 1969, to persons who, like the petitioners, attempt to buy houses from developers. Under those provisions, such persons will be entitled to injunctive relief and damages from developers who refuse to sell to them on account of race or color, unless the parties are able to resolve their dispute by other means. Thus, the type of relief which the peti-

tioners seek will be available within seven months time under the terms of a presumptively constitutional Act of Congress.[68] In these circumstances, it seems obvious that the case has lost most of its public importance, and I believe that it would be much the wiser course for this Court to refrain from deciding it. I think it particularly unfortunate for the Court to persist in deciding this case on the basis of a highly questionable interpretation of a sweeping, century-old statute which, as the Court acknowledges, see *ante*, at 4, contains none of the exemptions which the Congress of our own time found it necessary to include in a statute regulating relationships so personal in nature. In effect, this Court, by its construction of § 1982, has extended the coverage of federal "fair housing" laws far beyond that which Congress in its wisdom chose to provide in the Civil Rights Act of 1968. The political process now having taken hold again in this very field, I am at a loss to understand why the Court should have deemed it appropriate or, in the circumstances of this case, necessary to proceed with such precipitous and insecure strides.

I am not dissuaded from my view by the circumstance that the 1968 Act was enacted after oral argument in this case, at a time when the parties and *amici curiae* had invested time and money in anticipation of a decision on the merits, or by the fact that the 1968 Act apparently will not entitle these petitioners to the relief which they seek.[69] For the certiorari jurisdiction was not conferred upon this Court "merely to give the defeated party in the . . . Court of Appeals another hearing," *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, or "for the benefit of the particular litigants," *Rice* v. *Sioux City*

[68] Of course, the question of the constitutionality of the "fair housing" provisions of the 1968 Civil Rights Act is not before us, and I intend no implication about how I would decide that issue.

[69] See *ante*, at 5, n. 21.

Cemetery, 349 U. S. 70, 74, but to decide issues, "the settlement of which is important to the public as distinguished from . . . the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393. I deem it far more important that this Court should avoid, if possible, the decision of constitutional and unusually difficult statutory questions than that we fulfill the expectations of every litigant who appears before us.

One prior decision of this Court especially suggests dismissal of the writ as the proper course in these unusual circumstances. In *Rice* v. *Sioux City Cemetery*, *supra*, the issue was whether a privately owned cemetery might defend a suit for breach of a contract to bury on the ground that the decedent was a Winnebago Indian and the contract restricted burial privileges to Caucasians. In considering a petition for rehearing following an initial affirmance by an equally divided Court, there came to the Court's attention for first time an Iowa statute which prohibited cemeteries from discriminating on account of race, but which would not have benefited the *Rice* petitioner because of an exception for "pending litigation." Mr. Justice Frankfurter, speaking for a majority of the Court, held that the writ should be dismissed. He pointed out that the case presented "evident difficulties," 349 U. S., at 77, and noted that "[h]ad the statute been properly brought to our attention . . . , the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance." *Id.*, at 76–77. This case certainly presents difficulties as substantial as those in *Rice*. Compare what has been said in this opinion with 349 U. S., at 72–73; see also *Bell* v. *Maryland*, 378 U. S. 226. And if the petition for a writ of certiorari in this case had been filed a few months after, rather than a few months before, the passage of the 1968 Civil Rights Act, I venture to say that the case would have been deemed

to possess such "isolated significance," in comparison with its difficulties, that the petition would not have been granted.

For these reasons, I would dismiss the writ of certiorari as improvidently granted.